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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 430.

In the Matter

of

The Petition of SPENCER KELLOGG & SONS, INC., as owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime,

SPENCER KELLOGG & SONS, INC.,
Petitioner,

HILDA M. HICKS, as Administratrix, and others,
Claimants-Respondents.

BRIEF FOR PETITIONER.

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Petitioner,

HILDA M. HICKS, as Administratrix, and others,
Claimants-Respondents.

BRIEF FOR PETITIONER.

Statement.

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, granted November 23, 1931 (R. 2377).

By the writ the petitioner seeks to review the decree of the United States Circuit Court of Appeals for the Second Circuit made on July 31st, 1931 (R. 2377), affirming the decree of the United States District Court for the Southern District of New York, in admiralty, entered February 24th, 1931 (R. 240) on the opinion of

the Honorable John R. Hazel (R. 122), and on the opinion and findings of the Honorable Robert P. Patterson (R. 180, 228). The opinion of the Circuit Court of Appeals appears in the record on p. 2365, and is reported in 52 Fed. (2d) 129.

The opinions of Judge Hazel and Judge Patterson in the District Court are reported respectively in 24 F. (2d) 967 and 48 F. (2d) 311.

This is a proceeding for limitation of liability under §3 of the Act of Congress of March 3, 1851, c. 43 (9 Stat. 635; R. S. §4283; U. S. C., Tit. 46, §183) as amended by §4 of the Act of June 19, 1886, c. 421 (24 Stat. 80; R. S. §4289; U. S. C., Tit. 46, §188). For the Court's convenience we annex to this brief as "Appendix A" the text of the sections of U. S. C. above cited.

The jurisdiction of this Court is therefore based on Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, Tit. 28, Sec. 347), and on Article III, Section 2, Clause 1, of the Constitution of the United States.

This proceeding was brought by the petitioner, as owner of the motor launch "Linseed King" to limit its liability for damages caused as a result of the sinking of this launch in the North River, New York Harbor, opposite 96th Street, Manhattan, on December 20, 1926, causing the loss of many lives and giving rise to numerous claims by survivors for personal injuries.

The District Court held that the petitioner was liable for this disaster; that the petitioner had not established that the disaster had occurred without its knowledge and privity, and, therefore, could not limit its liability to the value of the launch, which was negligible (R. 123-141); that the regular employees of the petitioner, engaged in non-maritime work, could not recover in this proceeding,

but should be remitted to their claims under the New Jersey Workmen's Compensation Act (R. 180-196); and that certain men who had been engaged for the first time a day or two before and were coming to work on the day of the disaster were not subject to the New Jersey Workmen's Compensation Act and could recover in this proceeding (R. 196-197). In addition, claims were filed by a number of men (or their personal representatives) who were admittedly non-employees. The final decree awarded damages to all the claimants excepting the regular employees.

For the Court's convenience, we annex to this brief as Appendix "B", the pertinent provisions of the New Jersey Workmen's Compensation Act, New Jersey Laws of 1911, Chapter 95, Section II.

The Circuit Court of Appeals affirmed the decree of the District Court.

Issues Litigated in the District Court.

Without admitting any liability, the petitioner took the position at the trial that, in view of the trifling value of the launch after the disaster, it did not care to litigate the issue of liability, but would confine itself to the issue of limitation, and the defenses growing out of the New Jersey Workmen's Compensation Act.

From the beginning the petitioner conceded its liability under the New Jersey Workmen's Compensation Act. The petition did not ask that the filing of claims with the New Jersey Workmen's Compensation Bureau be enjoined; and the restraining order expressly granted leave to file such claims.

At the opening of the trial the petitioner, without admitting any liability, formally offered to consent to a

decree in favor of each of the claimants based on the New Jersey Workmen's Compensation Law (R. 289). This offer was rejected by all the respondents.

Description of the "Linseed King".

The "Linseed King" was a launch with a length over-all of 45 feet, a beam of 10 feet and a depth of 4 feet 6 inches. She was propelled by a gasoline engine. She was owned by the petitioner and was used to maintain a free ferry service between the petitioner's plant at Edgewater, New Jersey, and the dock, almost directly across the river, at the foot of 96th Street, Manhattan, for the transportation of those of petitioner's employees, who lived in New York. She was originally built in 1919, with a length of 35 feet. In 1922, she had been lengthened by cutting her in two amidships and inserting an additional 10 feet. At all times she had been used successfully and safely in the same service. As originally built the "Linseed King" had a covered cabin, which was enclosed at the sides with heavy canvas curtains, with glass windows in them. These curtains buttoned at the bottom. In March, 1925, a pilot house had been constructed at the forward end of the cabin. The floor of this pilot house was a few inches below the level of the main deck of the vessel and some 2½ feet above the level of the floor of the cabin proper. There was no partition between the pilot house and the cabin proper, but there was a pipe rail which extended part of the way across, immediately behind where the operator of the boat stood at the wheel. There were a number of glass windows in the pilot house, which slid up and down like an ordinary house window. At the after end of the

pilot house, on each side, there was an ordinary door, 22 inches wide (R. 591), at the top of a small flight of steps leading up from the floor of the cabin. A man could walk through these doors erect (Rohweder, R. 357). At the rear of the cabin there was an ordinary companionway, 29 inches wide (R. 591). This companionway was of the usual construction with a hatch over the top (Claimants' Exhibit DD) and a door in two sections, hinged at the sides. A short flight of steps led up to this door on the inside (Rohweder, R. 358).

The boat had a seat extending along each side of the cabin, and approximately 36 or 38 men could be seated (R. 680, 1813).

In the Fall of 1926, glass windows were substituted for the canvas curtains in the cabin. There were nine of these windows on each side. The two forward windows and the two after windows on each side were hinged at the bottom. At the top there was a light brass chain, in the middle of the window, secured to the top of the window and to the top of the sash by a light staple (Claimants' Exhibit I). This chain was about 14 inches long and enabled the windows to be partially opened for ventilation (R. 560). The staple could easily be pulled out by hand, as demonstrated by Mr. Aldrich (R. 579, 733). In between the hinged windows, there were five windows on each side of the cabin, which could be easily removed from the frame, being secured only by a small turn button at the top and bottom (R. 560).* All of the windows were 15 by 22 (on the outside of the sash), and

*Both of the lower courts appear to have misunderstood the evidence as to the construction of the windows, although the District Court's description is more nearly accurate than that of the Circuit Court of Appeals (see Opinion of District Court, R. 126; Opinion of Circuit Court of Appeals, R. 2365). The evidence is uncontradicted and is correctly stated above.

all of them were slightly beveled to prevent binding (R. 734, 5).

The boat was equipped with approximately 80 life preservers and several life rings.

Although the claimants made numerous criticisms of the "Linseed King" and charged that she was unseaworthy in many particulars, the District Court found that she was in all respects seaworthy for the service in which she was ordinarily employed. The question of her general seaworthiness was not even discussed by the Circuit Court of Appeals. Accordingly, we deem it unnecessary to deal with the question of seaworthiness as a part of our principal argument.

The Circumstances Leading up to and Attending the Disaster.

For some years prior to October, 1926, the day operator of the "Linseed King" had been one Matthew (commonly called "Marty") Dinkel.* The night operator throughout the year 1926, was one Fred Lang. In October of 1926, Dinkel left the employ of the petitioner and the boat was run for a few days by a man named Brown. On the 23rd of October, 1926, John Rohweder, an experienced seaman and operator of small boats, was employed by the petitioner as day operator of the "Linseed King". Rohweder ran the boat safely and without incident until the morning of Monday, December 20th, 1926. Knowing that there would be extra men to be carried on Monday morning, the works manager had issued instructions on Sunday afternoon, that an extra trip should be made.

On Monday morning Rohweder left Edgewater about

* In the record the name of this witness is spelled "Dingle".

10 minutes after six (about 15 minutes before he was scheduled to leave on his regular trip; McHale, R. 1771). The river was clear on the New Jersey shore, but as he drew near the New York shore, he encountered ice. The boat pushed through the ice to the dock, where a number of men were waiting to go on board. The number of men on board was the subject of much dispute at the trial; the District Court fixed the number at 78, and that finding was adopted by the Circuit Court of Appeals (R. 134; R. 2366).

According to the master, when he started on the return trip, the boat pushed her way slowly through the ice near the New York shore and then reached clear water, where she proceeded at full speed. He testified, that in his opinion, the ice which was encountered up to that time was not of a character which would damage the boat. When she reached a point about in the middle of the river, all the witnesses agree that the "Linseed King" struck heavily against some floating object, and immediately afterward she began to fill with water.

As might be expected, the testimony is conflicting as to the time that elapsed between the collision and the actual sinking of the "Linseed King". The lower courts found that the interval was about 2 minutes (R. 124; 2366). When those on board realized that the vessel was sinking rapidly, a panic occurred, with all of the tragic and horrible consequences, which are inseparable from such an occurrence. There was a rush for the exits during which there can be no doubt that many people were knocked down and trampled under foot. Naturally, no intelligent account of what actually occurred is obtainable. The undisputed fact is that 27 men remained in the cabin and were drowned. Of those who

came out of the cabin none appears to have stopped for a life preserver. Some of them clung to the "Linseed King" herself, or stood on her after deck or on top of the cabin. Others clung to pieces of ice, or stood on top of larger cakes of ice.

Twenty-eight survivors, including Captain Rohweder, were rescued by several vessels which came to their aid within half an hour of the disaster. Three bodies were picked up in the river shortly after the accident, making a total of 58 persons definitely accounted for at or near the time of the disaster.

When the vessel was raised she was found to have a jagged hole stove in her port bow (Marshall, R. 400, Petitioner's Exhibit 1). This hole was about 7½ inches wide and 16 inches long.

The petitioner offered no proof as to what the "Linseed King" struck on her last trip, but the claimants insisted that her bow was stove in by ice (R. 980-981, 1107, 1092, 1138, 1225, *1274*, 319) and they finally produced a witness who testified to having actually seen a large piece of ice on the port side of the vessel at the time of the accident, and stated that he was certain that she hit ice (John Sullivan, R. 1348-9). Under these circumstances, it appears to be established by uncontradicted evidence that the sinking of the "Linseed King" was caused by striking ice, and the District Court so found (R. 124). This finding was accepted by the Circuit Court of Appeals (R. 2366).

Moreover, it is established by uncontradicted evidence that the "Linseed King" could be navigated safely through broken ice, provided she proceeded slowly and carefully and provided the ice was not too heavy (Clayton, R. 472-3, 1878; Marshall, R. 451). The claimants have offered evidence to show that the "Linseed King"

was navigated at high speed through ice (Sullivan, R. 1348-9; Ludwig, R. 1274-5, 1284; Mitchell, R. 970; Barker, R. 1092). Indeed, that the boat was proceeding at high speed at the time of the collision, is undisputed and is self-evident from the hole in her port bow.

In this connection we call attention to the fact that the petitioner did not offer any evidence as to the navigation of the "Linseed King" on the day of the disaster. It is true, the petitioner called Captain Rohweder, but his direct examination did not cover anything which occurred after he left Edgewater on the morning of December 20th. Indeed, the petitioner's counsel repeatedly objected to the claimants' cross-examining him as to what occurred on the trip; and this cross examination was permitted only on the theory that it might tend to impeach his credibility or might have some bearing on the seaworthiness of the vessel (R. 319 *et seq.*). We submit that it did neither. The seaworthiness of the launch, the honesty of Captain Rohweder and his competence for his position are fully sustained by the record, and by the opinion of the District Court; but, in view of the fact that Captain Rohweder was in charge of the launch when she sank, and in view of the fact that the petitioner had decided to offer no evidence on the subject of its liability (as distinguished from its right to limit liability), the petitioner did not feel called upon to make Rohweder its witness for the purpose of explaining the disaster.

The petitioner made no criticism of Captain Rohweder, and did not charge him with any fault or negligence; the petitioner merely took the record made by the claimants on this issue without itself offering any evidence on the subject. The fact remains, on the record as it stands, that if the claimants have established

any liability in this case, it can only be on the theory, advanced by their own witnesses, that the "Linseed King" was run in heavy ice and run at excessive speed.

Laws and Regulations Applicable to the "Linseed King".

As the "Linseed King" did not carry passengers for hire, she was not subject to regulation by the United States local inspectors. The only legal requirements applicable to motor boats not carrying passengers for hire are those of the Motorboat Act of 1910, U. S. Code, Title 46, Chapter 16, Sections 511-519. The only provision of that law which has any bearing on the present case is the requirement that a life preserver be carried for every person on board.

The petitioner, however, has not sought to take refuge behind the fact that the "Linseed King" did not carry passengers for hire. On the contrary, the petitioner invited a comparison between the "Linseed King" and boats which are licensed to carry passengers for hire, and has shown that the "Linseed King" fully complied with every rule which would have been applicable to her if she had been licensed to carry passengers for hire.

Throughout this case it must be borne in mind that the "Linseed King" was being operated as a ferry.

St. Paul Fire & Marine Insurance Co. v. *Harrison*, 140 Ark. 158;
Futch v. *Bohannon*, 134 Georgia 313;
Parrot v. *Lawrence et al.*, 18 Fed. Case No. 10772, at p. 1235.

Accordingly, the number of passengers she could carry would not have been limited, even if she had been carry-

ing passengers for hire. Ferryboats are specifically excepted from the scope of the Federal Statute dealing with the number of passengers to be carried (R. S. 4464; 16 Stat. 454; U. S. C., Title 46, Sec. 451).

The Opinions of the District Court.

(a) *Opinion on the Merits.*

Judge Hazel found that instructions had been given to the operators of the boat that running her when there was ice in the river was forbidden; and that when ice appeared she would be laid up until spring (R. 129-130). Nevertheless, he found that the petitioner should have anticipated the presence of ice on the day of the disaster, and should have taken additional precautions to stop the running of the boat.

He found that the number of men on board was about 78 (R. 134). He found that, with this number on board, the men would be uncomfortably crowded, and that this impeded the men in leaving the cabin, or in using the life preservers. He found that the manager of the plant, Mr. Stover, knew, or should have known, that the boat had been crowded on previous occasions and that, therefore, this condition existed with the knowledge or privity of the owner.

Although the license of the boat only called for a crew of one man, Judge Hazel held that this was an insufficient crew at times when there was likelihood of the boat's being overcrowded. The evidence showed that instructions had been given by the manager of the plant that Rohweder should be given a man to help him whenever he needed it. It appeared, however, that there were certain men who always made the first morning trip

with Rohweder, and that it was his practice to call on these men to give him any assistance he required. Rohweder testified without contradiction that, on the morning of the accident, a chauffeur named Roberts was acting as his assistant, and was in the pilot house with him. He testified further that he had all the help he needed on the morning of the disaster. Although Roberts was regularly employed as a chauffeur, he was awarded damages in this case on the theory that he was engaged in a maritime employment at the time of the disaster. Nevertheless, Judge Hazel held that the boat should have had a larger crew, and that this was a fault in respect of which the petitioner could not limit its liability.

Judge Hazel did not determine the question as to the application of the New Jersey Workmen's Compensation Act, but referred this to the Special Commissioner, together with the various questions of damages (R. 140, 145).

(b) *Opinion on the Application of the New Jersey Workmen's Compensation Act.*

The Special Commissioner found that the New Jersey Workmen's Compensation Act did not apply in the present case because the claims arose out of a maritime disaster, while the launch was engaged in interstate commerce. The exceptions to this report came on before Judge Patterson, who held that the New Jersey Workmen's Compensation Act did apply to the regular employees, but did not apply to a large class of men who had not actually worked at the petitioner's plant, but had been there a day or two before and had been told to come back when the seed ship "Tercero" arrived, at

which time they would be put to work. He held that these men were not employees within the meaning of the Act, and also that their contemplated employment was maritime.

A number of the men on board were going to the petitioner's plant for the first time, and were admittedly non-employees; in these cases damages were awarded.

Issues Presented in the Circuit Court of Appeals.

The petitioner appealed from so much of the decree as denied it a limitation of its liability. Alternatively, it appealed from so much of the decree as held that the second class of men mentioned above (*i. e.*, men who had been at the plant a day or two before, had been engaged and told to return on the morning of the disaster) were not subject to the New Jersey Workmen's Compensation Law.

Appeals were also taken by those claimants who were remitted to their remedy under the New Jersey Workmen's Compensation Act, *i. e.*, the regular employees, or their personal representatives.

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed in all respects the decree of the District Court.

In its opinion, however, the Circuit Court of Appeals did not adopt the finding of the District Court that the boat was overcrowded and undermanned. The Circuit Court of Appeals found it unnecessary to decide the question of overloading; and did not even mention the question whether the boat had a sufficient crew.

The District Court's denial of the limitation of liability was affirmed solely on the ground that the petitioner was not justified in relying on the master of the boat to obey the positive instructions which they had given him, namely, that he was not to run the boat when there was ice in the river.

Issues Presented in This Court.

This petitioner applied for certiorari on two grounds:

> First, that the Circut Court of Appeals improperly held that this petitioner, which had given definite and specific instructions to a competent subordinate not to run the "Linseed King" when there was ice in the river, was nevertheless liable without limitation for damages resulting from the disobedience of its express orders.
>
> Second, that the Circuit Court of Appeals improperly held that certain workmen who had been engaged two days before and were coming to work on the "Linseed King" for the first time, were not subject to the New Jersey Workmen's Compensation Act.

These two questions are dealt with in Part I of the present brief.

In the District Court this petitioner was denied a limitation on two additional grounds, which were not adopted by the Circuit Court of Appeals, *i. e.*, that the "Linseed King" was overloaded and undermanned.

In Part II of this brief we shall discuss these findings of the District Court.

PART ONE.

ISSUES DECIDED BY THE CIRCUIT COURT OF APPEALS ADVERSELY TO THIS PETITIONER.

POINT I.

The petitioner had exercised the utmost care to prevent the running of the "Linseed King" when there was ice in the river.

(a) *Definite instructions had been issued by the officers of the corporation to the manager of the plant that the boat should not be run in ice, and these instructions had been passed on to everyone who had anything to do with the boat, including the captain.*

The finding of the District Court on this point is as follows:

> "'The undisputed evidence of various witnesses, including Rohweder, Stover, the works manager, and Balz shows that instructions were given her operators that running her when there was ice was forbidden; and she would be laid up, when ice appeared, until spring. Rohweder also testified that Balz was his immediate superior and he was told by him and by Stover, the manager of the plant, not to run when ice appeared, in heavy fog, or in stormy weather, and, moreover, not to carry any more men than there were life preservers. Stover had received such instructions from Aldrich, the secretary of petitioner" (R. 129-130).

This finding is fully sustained by the evidence, and

was adopted by the Circuit Court of Appeals. The latter Court said (R. 2369):

> "Rohweder, we are to assume, was a competent man. He had instructions from Stover not to press through ice, and if these were enough, it is impossible to charge his superior with fault."

Although the management of the Edgewater plant was largely entrusted to Mr. Stover, the works manager, he was given no discretion in the matter of running the "Linseed King" when there was ice in the river. He had specific orders from the officers of the corporation that she was not to be run under such conditions (Stover, R. 730; Aldrich, R. 563). These orders had been passed on to everyone who had anything to do with the boat, including the captain (Stover, R. 726-7, 730; Balz, R. 501; Dinkle, R. 1818; Rohweder, R. 306, 315). Even if the case were to be decided on the claimants' testimony alone, the weight of evidence would be contrary to the claimants' assertion that the boat was permitted to run when there was ice in the river (Lang, R. 1641, 1658; Gould, R. 1159; Klahre, R. 1201; Dressler, R. 1162).

Notwithstanding the large number of witnesses called and the long and tedious cross examination of several of petitioner's witnesses, the facts in this connection are too clear to be obscured by argument. Everyone who had to do with this boat, from Mr. Stover down to the master, had definite orders that the running of the boat was to be discontinued as soon as any ice appeared in the river. After ice had once appeared, in previous years, she was never run during the night, but Mr. Stover would sometimes authorize daylight trips when the river was clear (Stover, R. 738, 740; Dinkle, R. 1819-9). Certainly there can be no criticism of this system of opera-

tion, which shows that the utmost care was used to avoid any possibility of danger.

In considering the evidence it is important to bear in mind that there were two different events which most of the witnesses had in mind. One was the discontinuance of regular trips and the other was actually laying the boat up for the Winter (*cf.* Stover, R. 739-740). The operator of the boat, of course, would not actually lay her up for the Winter without consulting Stover.

The claimants urge that the petitioner should have established some system by which it could have been determined in advance when ice was to be expected. It sufficiently appears from the evidence in this case that it would be impossible to obtain reliable information on this point, and that there is no way of determining when ice will appear in the lower reaches of the Hudson River. The claimants argue, however, that if it could not be known when the ice would appear, then the boat should not have been run when there was any possibility that there would be ice in the river. There might be some force in this argument if it were the petitioner's practice to send the boat out in the darkness of the early morning with a lot of men on board. This, however, was never done. On the contrary, the first trip in the morning was always made by the master alone, or occasionally with one or two passengers (McHale, R. 1941; Stover, R. 1936). In view of the fact that the "Linseed King", even when full of water, had ample buoyancy to remain above the water with a considerable number of people on the top of her cabin (R. 1352), there was certainly nothing reprehensible in this practice. If ice were discovered on the way over to New York the trip would be abandoned and the boat would return to Edgewater. Claimants'

witness Klahre, testified that this had actually occurred when he was running the boat during the previous year (R. 1201).

Petitioner does not wish to be understood as conceding that the "Linseed King" could not be run safely even when there was a considerable amount of ice in the river. On the contrary, it appears by uncontradicted evidence that, so long as the ice was not too heavy, she could run with safety, if carefully navigated (Clayton, R. 472-3, 1878; Marshall, R. 451). The fact is, however, that the petitioner was unwilling to run the boat under any conditions which involved the slightest danger; and, if the vessel were allowed to run at all when there was ice in the river, the person operating the boat might use bad judgment in estimating the thickness of the ice, or might commit some error of navigation while passing through it. For these reasons, out of an abundance of caution, the petitioner allowed no discretion, on this subject, to any of its employees, but gave definite and positive instructions that the boat was not to be run when there was any ice in the river.

(b) *There was no ice in the Hudson River in the vicinity of the petitioner's plant prior to the day of the accident, excepting a small quantity of ice which appeared for a short time on the early morning of the previous day (Sunday); and neither the manager of the petitioner's plant nor any of his subordinates in the management of the plant was chargeable with notice of any ice in the river prior to the accident.*

The truth of the foregoing statement is so completely established—not only by the petitioner's evidence (Herben, R. 1690; Steinfatt, R. 1707; Chrisler, R. 1714-5;

Sayer, R. 1733; Fort, R. 1742-3; Erickson, R. 1748; Schmidt, R. 1752, 1761; Thomas Quinn, R. 1757; Rohweder, R. 383; Balz, R. 502; Stover, R. 738; McHale, R. 1783), but by the evidence of all the credible witnesses called by the claimants themselves (Lang, R. 1639-41, 1650; Dressler, R. 1166; Oliver, R. 853, 860-1; Samuel Quinn, R. 917, 919-20; Cook, R. 1122), and is so well substantiated by written records kept by such organizations as The New York Central Railroad Company (R. 1714), Pennsylvania Railroad Company (R. 1733), Cornell Steamboat Company (R. 1387), Atlantic Lighterage Company (R. 1761) and Dyckman Street Ferry Company (R. 1122), that it is difficult to understand how there could be any difference of opinion on this issue.

Nevertheless, Judge Hazel reached a conclusion contrary to the evidence above mentioned. His opinion indicates that he gained the impression that there was ice in the river for a week prior to the accident. He appears to have made no distinction as to the place where ice was seen. For example, he refers to the fact (R. 131) that Oliver encountered difficulty with ice on December 4th; although this difficulty was encountered between Albany and Kingston, more than seventy-five miles above New York (R. 851). In the Circuit Court of Appeals, the petitioner analyzed the testimony in considerable detail and showed that the great preponderance of the claimants' own testimony was in accord with the testimony offered by the petitioner. All of the credible evidence on both sides establishes that the facts were as above stated. Indeed, the only evidence to the contrary was given by a few persons who had no reason to observe or remember ice conditions; such as policemen on shore who kept no records, and merely expressed the opinion, a year after the event, that they had seen the Hudson River opposite

Manhattan Island covered with heavy ice from shore to shore for a week prior to the disaster. This testimony was so manifestly incredible in the light of the other testimony offered by the claimants themselves, *i. e.*, the testimony of unimpeached witnesses whose duty required them to observe and record ice conditions,—that the Circuit Court of Appeals very properly ignored it and found the facts as established by the contemporaneous records introduced both by the claimants and the petitioner. The testimony of all the witnesses who kept records was entirely consistent, no matter on which side they were called.

Under these circumstances we shall not, at least as a part of our argument in chief, submit to this Court a detailed analysis of the evidence as to ice conditions. We shall, however, briefly summarize the evidence on this subject.

Certain facts are not in dispute. It is agreed by practically all the witnesses that such floating ice as appears in the North River opposite Manhattan Island, is formed in the Hudson River from Tarrytown upward. When conditions of wind, tide and temperature are favorable, this ice comes slowly down the river in fairly large fields. When the ice is free to float with the tide, it will float down the river with the ebb and back with the flood; but, if not obstructed, it will move further down with the ebb than it moves up with the flood, owing to the slight current of the river. However, the ice will not ordinarily be free to run throughout an entire tide. The course of the river is not straight, and the wind, if any, tends to force the ice toward one shore or the other. A common phenomenon is that ice coming down the river on the ebb tide, with a westerly wind, is forced to the eastern shore and held above Fort Washington Point (R. 858-9; 1318-9), which is about 180th Street. When

the ice is held in shore for any length of time in cold weather, it frequently freezes fast and remains for considerable periods in that position (R. 860, 1319). Ice conditions in New York Harbor are very different from conditions further up the Hudson (R. 858). This difference results not so much from the difference in climatic conditions (although these change very rapidly as one goes inland from the sea) as from the difference in the salinity of the water. The water in New York Harbor contains a very much higher percentage of salt than the water in the upper regions of the Hudson, and therefore will not form ice excepting at much lower temperatures.

These circumstances explain the observations of the various witnesses as to ice at or about the time of the disaster. The facts are well established.

The record of The New York Central Railroad shows that the first ice of the year was observed off its float bridges at 72nd Street, Manhattan, between midnight and 4 A. M., on Sunday, December 19th, but at 4 A. M. the river was again clear and no further ice was observed until 4 A. M. on Monday, December 20th (R. 1715). This ice in turn disappeared before 8 A. M. (R. 1715) and no further ice was observed until Thursday, the 23rd (R. 1719). This record jibes remarkably with the testimony of claimants' witness Quinn, storekeeper for the Interstate Park Commission, who produced the record in his private diary, showing that the first ice drifting in fields was seen at Yonkers on Saturday, December 18th (R. 917-8) and the testimony of Cook, manager of the Dyckman Street Ferry (200th Street above Fort Washington Point) that the first ice in the river in the vicinity of his ferry appeared on Sunday, December 19th (R. 1122). This witness also testified from records kept in the course of his business.

Claimants' witness Robert Oliver, Jr., Superintendent of the Cornell Steamboat Company, whose office is at 53rd Street and who keeps track of ice conditions, which are important in his business, received his first report of ice on December 20th (R. 861). There was no report of ice prior to that date (R. 861).

The witness Sayer, who has charge of all the movements of the Pennsylvania Railroad Company's floating equipment, but whose office is opposite lower Manhattan, produced his official record and testified that the first report of ice in the Hudson River, affecting his equipment, was on December 23rd (R. 1733).

Asa Gritmon, claimants' witness, master of the tug "Bavier", testified that on the morning of the disaster, coming down the river with a tow on the ebb tide, he ran out of the ice at 158th Street (R. 1321) and encountered no more ice during his trip to the Cornell Steamboat Company dock at 53rd Street. When he set out from 53rd Street, about the time of the disaster, bound for 129th Street, he encountered no ice in the river until he reached approximately 80th Street. He observed the survivors of the disaster in the river and picked up a number of them about one quarter of a mile above the Spencer Kellogg plant at 7 A. M. (R. 1314). He then proceeded to Fort Lee (125th Street) but by this time there was no ice from Fort Lee down (R. 1320).

All this testimony fits together remarkably and gives a very accurate picture of how the ice moved in the river. The ice first appeared at Yonkers on Saturday, the 18th. On the early morning of Sunday, between midnight and daylight, it came down for the first time as far as the New York Central terminal at 72nd Street, but returned on the flood tide, leaving only traces along the shore inside the pier heads, as described by the claimants' witness

Fred Lang, who operated the "Linseed King" on Sunday morning (R. 1639). On Sunday, the wind was westerly (New York Central record, R. 1718) and the ice remained above Fort Washington Point, but during the early morning of Monday, conditions favoring, the ice again came down and reached as far as The New York Central Terminal at 72nd Street (R. 1718). The ice that Captain Rohweder encountered was part of the field which came down about 4 A. M. Monday morning, but apparently never reached below 72nd Street (Gritmon, R. 1320, 1324).

The Circuit Court of Appeals, speaking of December 18th, said:

> "On that day, Saturday, ice came down below Ninety-sixth Street on the Manhattan shore, but by the weight of the evidence none was observed opposite Edgewater on Sunday, and we may take it that at sundown there was no reason to believe that the river was not clear at that point, though there was much ice not many miles above, with knowledge of which Stover was chargeable" (R. 2369).

This statement, while perhaps literally true, is somewhat misleading unless explained. It is true that ice came down the river as far as 72nd Street during the early morning hours of Sunday, the 19th. It may be, although there is no definite evidence to that effect, that it reached a point opposite 96th Street before midnight, in which event it may be said that there was ice at this point on Saturday. We desire to emphasize, however, the fact that the ice came down the river and receded up the river again during the night. There was no ice off 96th Street until very late Saturday night; nor was there

any ice at this point during the daylight hours of Sunday, excepting a little ice on the New York shore very early Sunday morning. Although the claimants' witness Lang, who operated the boat Sunday morning, saw some ice in the river on Sunday morning, he said "it was light at that time" (R. 1639) and was "on the New York shore" (R. 1640). He did not make any report of this ice to anybody because he said "there was no danger" (R. 1640), and "if there was ice in the river Monday morning when he came in, that would be up to the man that took the boat across Monday" (R. 1640-1). He admitted that he had been instructed not to run the boat if there was ice in the river (R. 1641).

Not only was there no ice visible from the petitioner's plant on Sunday, but no one who had any supervision over the operation of the boat had any knowledge that there had been any ice in the river. The witness Balz, who was a subordinate of Stover and immediately in charge of the operation of the boat, had not seen or heard of any ice in the river prior to December 20th (R. 502).

Stover and McHale testified to the same effect (R. 738, 1772), and testified that they were at the petitioner's plant on the afternoon of Sunday, December 19th, and observed conditions in the river from the roof of the pier, but saw no indication of any ice in the river (R. 728, 1772, 1783).

It is clear, therefore, that there was no cause for the works manager to give orders on Sunday that the boat should be laid up immediately and should make no trips on Monday. Even if the works manager had known of the fact that ice had come down during the night before, he would have been justified in relying on his instructions to Captain Rohweder and Lang not to run the boat if there was ice in the river, and to assume that if the ice

did return on Monday morning, of which no one could be certain, the man in charge would follow his instructions and not make the trip. *It must be remembered, that on the first trip across from New Jersey to New York, no passengers would be carried and that if ice were in the river on Monday morning, it would be discovered on this trip before any passengers were taken on board.*

(c) *The precautions taken by the petitioner were adequate.*

We have already quoted (*supra*, pp. 15-16) the findings of the lower courts that this petitioner had given proper instructions to the men who operated the "Linseed King". These instructions were that she was never to be run under any unsafe conditions and, specifically, that she was not to be run when there was ice in the river.

At the time of the disaster, the boat was in charge of an exceptionally competent man. His competence was both conceded and proved. When the question first came up, counsel for the claimants made the following statement on the record (R. 300):

> "I concede that this man Rohweder was a competent, experienced seaman, and was a competent man as far as he was concerned."

Notwithstanding this concession, the petitioner proved that Rohweder was an experienced seaman who had sailed all over the world in all kinds of ships. He originally went to sea in a German training ship, served as quartermaster on trans-Atlantic liners, and spent several years as a sailor on the Great Lakes (Rohweder, R. 302-3; Meno, R. 298-300). He was also experienced in the

operation of motor launches in New York Harbor, and held a license for that service (Rex, R. 301-2; Rohweder, R. 304). The finding of the District Court on this issue was as follows:

> "She was admittedly under the control, at the time of the mishap, of an experienced motorboat pilot, whose skill and experience was the subject of inquiry and was tested before his employment by responsible agents of petitioner. He alone was in charge at the time of the mishap" (R. 129).

The situation is, therefore, that the petitioner, after careful investigation, had employed an exceptionally competent man to run the "Linseed King"; they had given him proper instructions, and he was in sole charge of the launch at the time of the disaster.

We concede that the petitioner could not, after giving these instructions, close its eyes to repeated and obvious violations thereof; but, on the other hand, we contend that, until it had some notice that Rohweder was not following his instructions, the petitioner was entitled to assume that he would do so. It was under no obligation to establish a system of espionage, or keep track of ice conditions further up the Hudson River. Even if they had never mentioned the subject of ice, we submit that they would have been entitled to leave the navigation of the boat to a competent master under general instructions not to run her under any unsafe conditions, but they went further than this; they specifically instructed the operator not to run the launch when there was ice in the river. We submit that this shows a very high degree of care and a keen sense of the petitioner's obligations in the premises. Under these circumstances petitioner is clearly entitled to a limitation, unless it is chargeable

with knowledge that its instructions were not being obeyed.

What is the evidence on this subject? As we have shown in our discussion of the evidence as to ice conditions, there was nothing in these conditions which brought home knowledge to the petitioner that there was any ice in the vicinity of its plant prior to the disaster. That there was ice in the upper reaches of the Hudson might well be assumed. It might also be assumed that this ice would ultimately reach the vicinity of 96th Street, although this does not always occur, and the time when it will occur is entirely uncertain. For example, it appeared that there had been no ice in the harbor (in the Winter of 1927-8) up to the time of the trial of the present case, which started on January 12th (R. 285, 894). The question whether ice will come below Fort Washington Point depends on many conditions of wind, temperature and tide. If the petitioner had endeavored to forecast the ice conditions, as suggested by the lower courts, it would have been justified in assuming that ice would not come down the river on the day of the accident. This appears from an examination of the weather report, Claimants' Exhibit E (R. 2341). It there appears that the weather was extremely cold from the 15th to the 19th, inclusive. Throughout that period the temperature never rose above freezing, and the mean temperature was very much below normal (see column headed "Departure of Mean from Normal"). Moreover, the wind was from the northwest throughout this period, which would tend to set the ice on to the New York shore. Under these conditions, it was to be expected that the ice would freeze along the shore north of Fort Washington Point (Oliver, R. 859, 860; Quinn, R. 1760; Gritmon, R. 1319). The vagaries of floating ice in the

Hudson River are well illustrated by the fact that for several days after the sinking of the "Linseed King" no ice appeared in the river.

On the general question whether the petitioner should have anticipated the presence of ice in the river on December 20th, 1926, we call attention to the fact that this was the earliest date on which ice had appeared in the North River for many years (R. 1728-9).

We submit, however, that the petitioner was not bound to speculate as to when ice would appear in the river. Having given orders that their boat was not to be run when there was ice in the river, they were entitled to assume that their instructions would be obeyed. If this is not so, it can only be on the theory that the petitioner could not properly run the "Linseed King" after the earliest date when ice could possibly appear. This would mean that they must lay the boat up early in November, and never run her again until April. We know of no authority for such a rule, and none has been suggested. Considering that the "Linseed King's" trips were only a little over a mile long, and occupied only a few minutes (R. 331), it would be an intolerable rule that she could not start out on one of these trips, in charge of a competent man properly instructed, for fear of conditions which might not arise for months, and which, when they did arise, would be clearly visible to the operator before he took on his passengers. It would be just as reasonable to say that the petitioner should not have operated the boat at all because she might be sunk by a storm, or caught in a dense fog, or sunk in a collision. All of these dangers were much more serious than the danger of damage by ice, in view of the specific instructions which had been given not to run the boat in ice.

POINT II.

The petitioner is entitled to a limitation of liability.

Upon the foregoing analysis of the testimony, and of the decisions of the lower courts, we submit that petitioner is clearly entitled to a limitation of its liability unless it was chargeable with knowledge that the "Linseed King" was operated with passengers on board when there was ice in the river in the vicinity of its plant. There is no suggestion that the petitioner or its manager had any actual knowledge of the presence of ice.

It being established that the petitioner had given the operator of the launch specific instructions that she should not be run when there was ice in the river, the burden was on the claimants to prove that a wilful departure from these instructions was countenanced by the petitioner.

The language of this Court in *La Bourgogne* (210 U. S. 95, at pp. 126-7), is precisely in point:

> "* * * The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence."

We submit that the lower courts in the present case erroneously applied a wholly different and much more severe rule than was laid down in the above quotation. The Circuit Court of Appeals said (R. 2369-70).

> "On that day, Saturday, ice came down below Ninety-sixth Street on the Manhattan shore, but by the weight of the evidence none was observed opposite Edgewater on Sunday, and we may take it that at sundown there was no reason to believe that the river was not clear at that point, though there was much ice not many miles above, with knowledge of which Stover was chargeable.
>
> Rohweder, we are to assume, was a competent man. He had instructions from Stover not to press through ice, and if these were enough, it is impossible to charge his superior with fault. We think that they were not. The degree of care exacted in any situation depends, not only upon the likelihood of injury, but on its gravity if it comes.
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> * * * * * * * *
>
> Faced with such grave possibilities, it was not enough to leave the decision to a competent subordinate. It is difficult to excuse the failure entirely to suspend the service on Saturday when the ice had once appeared, but if we are to suppose that anything could justify its continuance, Stover was bound to the most elaborate precautions, even if it involved going along himself. Perhaps this was not necessary; possibly inquiries of the towing companies that morning would have served. What he should not have done was to leave the decision to the judgment of Rohweder. We hold that the company has not shown Stover free from fault."

By way of preliminary comment on the language above quoted, we beg to point out that the reason the operation

of the boat was not suspended on Saturday was that no ice appeared until the late hours of Saturday night; and the fact that it had appeared was never reported to Stover or anybody else in authority.

We call attention also to the fact that the petitioner did not "leave the decision to a competent subordinate" so far as concerned running the boat when there was ice in the river. Instead of leaving "the decision to the judgment of Rohweder", the petitioner had given Rohweder definite and positive instructions that the boat was not to be run when there was any ice in the river. If these instructions had been obeyed, the accident could not have occurred.

The action of Rohweder in taking on passengers and attempting the return trip through the ice was a direct violation of his orders, and of the instructions given by the officers of the Company. This action has been held by both courts to be the primary cause of the disaster.

The doctrine laid down by the Circuit Court of Appeals in the present case is that, where the possible consequences of a disaster are particularly serious, a corporate officer, higher in rank than the captain but (at least in this case) wholly unfamiliar with maritime affairs, must be physically present on the vessel in order to insure the Captain's obedience to the instructions issued in good faith by the corporation. This ruling amounts to a repeal of the Act of 1851 and the Acts amendatory thereof and supplementary thereto, in all cases where the consequences of a disaster may be specially serious, *i. e.*, in all cases where these Acts are really important. The result of such ruling is that if the petitioner's officer actually goes on the vessel and the rule is violated, the petitioner is guilty of participation in the fault and consequently has privity and knowledge

and cannot limit liability. On the other hand if the petitioner's officer fails to go on the vessel and there is a violation of petitioner's order which brings about a disaster, it will be held that the petitioner has not taken adequate precautions to insure obedience to its order and consequently cannot limit liability. Under this ruling the petitioner will be deprived of the right to limit in any event and the Act of 1851 is rendered a nullity.

There is no question but that the instructions of the petitioner to the master of the "Linseed King" were given in good faith and intended to be obeyed. There were other means of transportation for the petitioner's employees to its plant at Edgewater via 125th Street ferry and bus, a route which a number of them took and which was always available. The launch was run for their convenience and saved them expense, as there was no charge for this transportation. That Captain Rohweder was experienced and competent was admitted by the claimants at the trial (R. 299-300). There is no suggestion in the record of any reason for anticipation by the responsible officers of the petitioner that their orders would not be obeyed.

Counsel have been unable to find any other decision in the courts of the United States holding that after issuing positive instructions to a competent subordinate with respect to the performance of a definitely described act, the petitioner will be denied the right to limit liability for failure to take additional precautions to guard against violation of its definite orders issued in good faith. It may safely be said that the decision of the Circuit Court of Appeals is contrary to the law in all other circuits. It is definitely contrary to the decisions of this Court in interpreting the Limitation of Liability Act of March 3, 1851, as amended.

La Bourgogne, 210 U. S. 95, 126-7;
Butler v. *Steamship Company*, 130 U. S. 527, 549;
Richardson v. *Harmon*, 222 U. S. 96, 105;
The City of Norwich, 118 U. S. 468;
The North Star, 106 U. S. 17;
The Scotland, 105 U. S. 24;
Craig v. *Continental Insurance Co.*, 141 U. S. 638, 646;

and to decisions in other circuits, as follows:

American Hawaiian Steamship Company v. *Pacific Steamship Company*, 41 F. (2d) 718 (C. C. A. 9);
Kitsap County Transportation Company v. *Harvey*, 15 F. (2d) 166 (C. C. A. 9);
Warnken et al. v. *Moody*, 22 F. (2d) 960 (C. C. A. 5);
Standard Wholesale, etc. Works v. *Chesapeake Lighterage & Towing Co., Inc.*, 16 F. (2d) 765 (C. C. A. 4);
Quinlan v. *Pew*, 56 Fed. 111 (C. C. A. 1);
The North Star, 3 F. (2d) 1010 (D. C. Mass.).

Can any case be imagined where the possible consequences of violation of the owner's orders would be more serious than in the case of "La Bourgogne", to which we have just referred? That vessel was laden with many passengers, a full complement of officers and a considerable crew. The vessel was not equipped with watertight bulkheads and after the collision sank in a very short time. The loss of life and property in that case was many times more serious than here. Yet this

Court did not deem it open to question that where the owner had issued proper instructions to its competent officers, and the collision was brought about by their violation of the Company's rules and instructions, privity and knowledge did not exist and the owner was entitled to a limitation of its liability.

Similarly in the case of *American Hawaiian Steamship Co.* v. *Pacific Steamship Company,* 41 Fed. (2d) 718, decided by the Circuit Court of Appeals for the Ninth Circuit, the right of the Pacific Steamship Company, as owner of the steamship "Admiral Fiske", to limitation of liability was contested on the ground that the master of the "Admiral Fiske" failed to comply with the provisions of the Seaman's Act of 1915, with respect to the division of watches at sea, and that the owner failed to use due diligence to make the "Admiral Fiske" safe at sea, in that unsafe and insufficient deck watches were maintained with the privity and knowledge of the Company.

The Circuit Court of Appeals said (p. 720):

> "The duty of complying with this statute was properly delegated to the master of the 'Admiral Fiske', under proper instructions from the company, and the company is not to be held blameworthy for failure to interfere with the division of watches actually made unless it is shown that it was apparent to those in authority that the instructions were not being complied with and that disciplinary measures were required."

The court referred to the close parallel between the question presented in that case and the question considered by this Court in the case of *La Bourgogne,*

supra. The Circuit Court of Appeals expressly followed the decision of this Court in that case, quoting the language which we have quoted above. The court continued, as follows:

> "The provisions of the statute permitting limitation of liability are to be liberally construed. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. Ed. 1038. And where the owner of a vessel has properly delegated duties with respect to her management to a competent person, and there is here no contention that the master of the 'Admiral Fiske' was not competent, something more is required in establishing knowledge and privity as to violations of statutes or regulations than mere negligence as to discovering whether or not those duties have been properly carried out; some degree of actual knowledge or participation must be brought home to the owners. *La Bourgogne, supra; The Annie Faxon* (C. C. A.), 75 F. 312; *Kitsap County Transportation Co.* v. *Harvey* (C. C. A.), 15 F. (2d) 166, 48 A. L. R. 1420; *Petition of Canadian Pacific Railway Co.* (D. C.), 278 F. 180, 181" (pp. 720-1).

Similar decisions in other circuits are:

> *Quinlan* v. *Pew*, 56 Fed. 111 (C. C. A. 1);
> *Warnken et al.* v. *Moody*, 22 F. (2d) 960 (C. C. A. 5);
> *Standard Wholesale, etc. Works* v. *Chesapeake Lighterage & Towing Co., Inc.*, 16 F. (2d) 765 (C. C. A. 4).

It is well settled, also, that the Act of 1851 was passed to encourage the building and operation of vessels and

that it is to receive a fair and liberal construction to effectuate the evident intention of Congress.

In *Butler* v. *Steamship Company*, 130 U. S. 527, 549, this Court said of the policy of the Act:

> "That ground is, that for *the encouragement of shipbuilding and the employment of ships in commerce*, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge". (Italics ours.)

and this language is quoted with approval in the case of *Richardson* v. *Harmon*, 222 U. S. 96, 104.

In the *84-H*, 296 Fed. 427, 430, the Circuit Court of Appeals for the Second Circuit said:

> "The Limited Liability Act was passed for the encouragement of shipbuilding and the employment of ships in commerce, by providing that the owners of ships should not be liable beyond their interest in the ship and freight for the acts of the master and crew done without their privity or knowledge."

In the case of *Providence & New York Steamship Company* v. *Hill Manufacturing Company*, 109 U. S. 578, 589, this Court indicated that the law should be enforced "in a spirit of fairness, with a view to giving to ship owners the full benefit of the immunities intended to be secured by it". And this language was quoted with approval by this Court in the case of *La Bourgogne, supra.* This principle of interpretation of the Act has been consistently applied by this Court.

Butler v. *Boston Steamship Co.*, 130 U. S. 527;
The City of Norwich, 118 U. S. 468;

The North Star, 106 U. S. 17;
The Scotland, 105 U. S. 24.

It is well settled that Sections 4283-4289 of the Revised Statutes (Act of March 3, 1851) apply to motor launches, yachts and other vessels of this type.

In re Luvina, 1927 A. M.C. 327;
Warnken v. *Moody,* 22 F. (2nd) 960;
In re Benedict, 282 Fed. 238.

It was suggested by counsel for the claimants in the lower courts, that the policy of Congress to encourage shipbuilding evidenced by the Limited Liability Act, did not extend to the encouragement of the building of launches such as the "Linseed King" for inland service. This is quite erroneous. It is true that the Act as originally passed March 3rd, 1851, did not apply to any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation; but the operation of the Act was greatly extended by the amendment of June 19, 1886, which removed the exception in the original Act excluding inland vessels, and extended the benefits of the Act to all vessels whether used on inland waters or not.

Congress could not more definitely have indicated its intention to include launches of the type of the "Linseed King" within the general policy of the Act than it did by definitely amending the original Act to bring the smaller vessels within its terms. Surely the Act cannot be differently construed as to different classes of vessels, all of which are all entitled to the benefits of the Act; and the petitioner, as owner of the launch "Linseed King", is as clearly entitled to a liberal construction of the Act as the owner of the largest ocean liner.

Mere negligence of servants or employees of the ship owner will not defeat the right of limitation, which is only denied on the ground of the knowledge or privity of the owner himself. In the case of *La Bourgogne, supra,* this Court said:

> "Without seeking presently to define the exact scope of the words privity and knowledge, it is apparent from what has been said that it has been long since settled by this Court that mere negligence, pure and simple, in and of itself, does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge wthin the meaning of the statute" (210 U. S. 95, 122).

In the case of *The Oneida,* 282 Fed. 238, 241, the Circuit Court of Appeals for the second Circuit stated the universally recognized rule as follows:

> *"The knowledge or privity that excludes the operation of the statute must be in a measure actual, and not merely constructive. It must be actual, in the sense of knowledge or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them. The Colima* (D. C.), 82 Fed. 665; *Quinlan* v. *Pew,* 56 Fed. 111, 5 C. C. A. 438; *The La Bourgogne,* 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973." (Italics ours.)

To the same effect see *The 84-H, supra,* at page 431; *The Colima,* 82 Fed. at page 679.

Citations to this effect might be multiplied indefinitely. We shall merely give the references to a few of the pertinent cases:

American-Hawaiian S. S. Co. v. *Pacific S. S. Co.,* 41 F. (2d) 718;

Kitsap County Transportation Co. v. *Harvey*, 15 F. (2d) 166;
The North Star, 3 F. (2d) 1010;
Standard Wholesale, etc. Works v. *Chesapeake Lighterage & Towing Co., Inc.*, 16 F. (2d) 765.

The privity or knowledge must be that of the managing officers of a corporation and not merely negligence of servants and employees.

Craig v. *Continental Insurance Company*, 141 U. S. 638, 646.

It is true that the knowledge of a Manager or Superintendent may defeat a limitation where the fault or negligence occurs in a field which has been completely delegated to such Manager or Superintendent. In the present case it will scarcely be suggested that there had been any such delegation to any person other than Mr. Stover, the Manager of the Edgewater plant; and even Mr. Stover was subject to definite orders and supervision in matters affecting the operation of the "Linseed King". He had specific orders that she was not to be run when there was ice in the river. Under these circumstances it is very doubtful whether even a deliberate violation of his instructions would deprive the petitioner of the right to limit its liability. This question, however, does not arise. Stover unquestionably passed on the instructions he received and had no knowledge that they were not observed. Under these circumstances the petitioner surely cannot be deprived of limitation merely on the theory, that Stover, who was himself a subordinate acting under definite instructions, did not use sufficient diligence in following up his own subordinates to see that they carried out similar instructions which he had given them.

We submit that the decision of the Circuit Court of Appeals is contrary to the decisions of this Court and to the decisions of the Circuit Court of Appeals in other circuits; that it effectually nullifies the benefits of the Limitation of Liability Acts provided by Congress for the encouragement of the building, ownership and operation of ships; that it fails to interpret the limited liability act in that "spirit of fairness, with a view to giving to shipowners the full benefit of the immunities intended to be secured by it", which this Court has laid down as the proper rule of interpretation; and that it is based on the novel and untenable ground that seriousness of possible consequences of violation by a competent subordinate of the owner's positive instructions, requires personal supervision on the part of the owner of the acts in question.

The only fault established in this case consisted of running the "Linseed King" through ice, which was done in direct violation of the petitioner's positive instructions. On every other charge of fault, the claimants completely failed. The evidence establishes that the boat was thoroughly seaworthy; that she was properly manned; and that she had ample capacity to carry the number of men who were on board at the time of the disaster. It is not shown that the petitioner's method of operating the "Linseed King", when the river was clear of ice, violated any law, regulation or custom which applied to her or would have applied to her if she had been carrying passengers for hire. The claimants' criticisms of her operation are based entirely on the tragic consequences of a catastrophe which could not have occurred but for a direct violation, by a competent subordinate, of petitioner's specific and positive instructions.

We submit that the petitioner is entitled to a limitation of its liability.

POINT III.

The men who had been at the petitioner's plant a day or two before the disaster and had been definitely engaged to come to work when the seed ship arrived were subject to the New Jersey Workmen's Compensation Act.

(a) *The men were employes and the accident arose out of and in the course of their employment.*

In the District Court the application of the Workmen's Compensation Act was resisted on numerous grounds as, for example, that the accident happened outside the State of New Jersey; that the men had not yet reached the place where their work was to be performed; that the accident occurred on navigable waters; that the launch was engaged in interstate commerce; that the accident was maritime. All of these, and a number of other objections were disposed of by Judge Patterson in favor of the petitioner. Accordingly, we deem it unnecessary, at this time, to present any argument in support of the general proposition that the Workmen's Compensation Act is binding upon all of the petitioner's employees who were on the "Linseed King". The only question presented on this appeal is whether the Compensation Act applies to the particular class of persons mentioned above, *i. e.*, men who had not previously done any work, but were coming to work pursuant to the contract of employment made at the petitioner's plant a day or two before. These men are listed in the decree of the District Court on page 232 of the Record.

This presents a very narrow issue, on which Judge Patterson expressed himself as follows:

"There is still a third group of men who had

applied for employment several days prior to December 20th, had been given slips of paper with numbers, and had been told to report for work on December 19th, to unload a ship. These men had reported on December 19th, as instructed. They were then told that the ship had not arrived and that they should return for work the next day. They were returning when the disaster happened. They had done no work and had earned no compensation. The commissioner held that these men were employees. I do not agree. In my opinion, the status of employer and employee had not yet come into existence, and the compensation statute does not apply to these cases. *Coco* v. *Wilbur*, 104 N. J. Law 275, seems indistinguishable. It appears, moreover, that the work expected of these men was the unloading of a ship. This would be maritime employment and the workmen's compensation act does not apply to an injury or death to maritime employees which happen on navigable water. *Southern Pacific Co.* v. *Jensen, supra; March* v. *Vulcan Iron Works, supra.* The longshoremen's and Harbor Workers' Compensation Act was not in effect at the time of this accident. Damages are therefore to be awarded in the cases involving men in this third group" (R. 196-7).

The "slips of paper with numbers", to which the court refers, were the stubs of time cards, from which the payroll was made up. The material facts are that these men had actually reported at the petitioner's plant in New Jersey; had been interviewed by the employment manager; had received time card stubs, and had been definitely instructed to return for work upon the arrival of the "Tercero". Their names were upon the payroll as appeared from the payroll abstract put into evidence by

Mr. Aldrich (Aldrich, R. 2260, 2267; Petitioner's Exhibit 2, R. 2266, 2359).

Most of these men had been engaged on Saturday. When they came to the plant Sunday morning, the "Tercero" had not yet arrived, and they were told to return on Monday morning. The "Tercero" actually arrived later on Sunday, and discharging was begun on that day (R. 1769-70). Accordingly, the men would have been put to work immediately on their arrival Monday morning (see Findings of Fact, R. 231). One of the time card stubs which the men received is in evidence (Petitioner's Exhibit "A"—Sullivan Case—R. 2222, 2361). The wording of this card is as follows:

"No. 3157
WEEK ENDING 192

Tear off this coupon and present it for wages on pay day. If lost, report at once to Payroll Dept."

(Reverse Side)

"Received From
SPENCER KELLOGG & SONS, INC.

$.....FOR WAGES, IN FULL.
.....
SIGN HERE BEFORE PRESENTING."

These stubs were found on the bodies of all the men in the class under discussion, which were taken from the boat.

The men who had been given time card stubs and told to report for work on Monday were separated, as a practical matter, from ordinary applicants for work by the fact that the "Linseed King" was making a special trip to carry the former class. These men had been told to report on the New York side at 6:00 o'clock; and the

Master of the "Linseed King" had been told to make a special trip to meet them at that hour (McHale, R. 1769-70, 1784; Exhibit JJJ, R. 2344). The petitioner's advertisement for laborers (Exhibit L) named 6:30 as the hour at which the applicants were to meet the boat on the New York side. The "Linseed King" was a little late on her first trip and some of the applicants for work were a little early, so that there was a slight overlapping in this respect, but this was purely accidental.

The Commissioner found that the men in question (designated during the reference as the "Saturday men") were employees. (See Opinion of Judge Patterson, R. 197.) Most of the witnesses so testified. It was obvious to anyone present at the examination of the witnesses, that the testimony to the contrary, given by one or two of the men, was a mere legal conclusion and entitled to no weight.

The District Court did not disturb this finding as a finding of fact. On the contrary, in its findings, the District Court said of these men:

> "*The men were then told that their services were required* to unload a ship which was expected to arrive at petitioner's dock at Edgewater, New Jersey, * * * and they were told to report for work * * *.
>
> (c) These men were returning, in accordance with these instructions when the disaster occurred" (R. 231).

The District Court's reasons for holding that the men were not within the New Jersey Workmen's Compensation Act are stated in its opinion as follows:

> "They had done no work and had earned no compensation. The Commissioner held that these

> men were employees. I do not agree. In my opinion, the status of employer and employee had not yet come into existence, and the compensation statute does not apply to these cases. *Coco* v. *Wilbur,* 104 N. J. Law 275, seems indistinguishable" (R. 197).

The foregoing quotations show that Judge Patterson found a state of facts which clearly constituted a contract of hiring; and the only authority which he cites is *Coco* v. *Wilbur,* in which case there was unquestionably a contract of hiring. It is clear from his opinion and findings that he regarded these men as not being employees within the meaning of the New Jersey Workmen's Compensation Act, not because no contract of employment had been made, but because the men had not done any work under the contract.

It is difficult to determine from the opinion of the Circuit Court of Appeals whether that court intended to reverse the District Court's findings of fact. The material portions of the Circuit Court of Appeals' opinion are as follows (R. 2370-1):

> "* * * there was a third class who had already appeared on Saturday, looking for work as stevedores to discharge the ship we have mentioned, expected that day, which did not, however, dock till Sunday. Having gone to the factory, these had been told to report back on Monday, when she would be in. They were given cards in evidence of the fact that they had already applied, which would entitle them to a preference when jobs were assigned. From this the company argues that they were already in its employ and equally subject to the compensation act as its regular employees.

> * * * This result depends upon some 'contract of hiring', without which the legal relations of the parties remain unchanged. That no such contract was made with these men on Saturday is too plain for debate. They were then assured of no work, of only a preference among those who might apply; at most any 'contract of hiring' was conditional upon jobs, still unfilled, when they appeared."

If the passage above quoted can be regarded as a finding of fact, it is not supported by the evidence. So far as we can ascertain from a careful examination of the record, there is only one case in which there is any evidence tending to sustain a finding that the man in question was only to get a preference in the allotment of jobs. This is the case of Aaron Cooper. This man did speak of getting a preference but in the next breath he states facts sufficient to constitute a contract of employment (R. 1150). When asked to state exactly what was said, he did so; and the conversation contains no mention of a preference. It is quite apparent, therefore, that his mention of a preference was merely a statement of his own conclusion as to the legal effect of the conversation; and even as a statement of a legal conclusion, it is contradicted by his own testimony which immediately precedes and follows it. On direct examination he had previously testified as follows:

> "Q. Were you employed, did you have a position, or were you working for them? A. They hired me Saturday, on the 18th" (R. 1137).

A little later he again testified under cross examination:

> "Q. Who hired you? A. Mr. Nelson, the time keeper" (R. 1150).

Even if Cooper's testimony as to his conclusions is admissible in his own case, it certainly is not admissible or binding in the other nineteen cases in which this same issue is involved. In most of these cases there is no testimony at all, excepting the testimony of the petitioner; and in a number of the cases, the petitioner's testimony is definitely confirmed by the pleadings or testimony of the claimants (See Appendix "C" attached to this brief).

Applicants for work at the petitioner's plant were sent first to a Mr. Nelson who had charge of employment. If the man was hired (but not otherwise) Mr. Nelson would take his name, address, age and other particulars and issue a time card; after which the man would be under the supervision of the Dock Superintendent, Mr. McHale (R. 1767-8; 1774; 2077). On this occasion, after the men had received their time cards from Mr. Nelson on Saturday, they were told to come back Sunday morning. In view of the fact that the boat had not arrived they were told to return Monday morning, reporting on the New York side at 6 o'clock (R. 1784).

That the men expected to work in connection with the discharge of the "Tercero", that time cards were issued to them, that they were told to report for work Monday morning when the ship would be in, and that they were returning pursuant to these instructions at the time of the accident are facts which are found by both of the lower courts and about which there can be no dispute. On these undisputed facts, the case presents a question of law as to whether these facts constituted a contract of employment. We concede that no formal contract of employment was made; but we submit that no formality is required, or is usual, in the employment of day laborers. When a prospective employer

says to a prospective employee, "Come back tomorrow morning to go to work", and the employee on the following morning, actually boards a vehicle furnished by the employer to transport him to work, there is an actual contract of employment which is just as binding as though it were written out in express terms, and which would support an action for damages if employment were refused.

Apart from the facts stated above, about which there can be no question, we believe that there is no competent testimony in the case. Where testimony was given, it is merely the statement of a legal conclusion. For this reason, we shall not discuss the evidence on this point in our brief, but we attach hereto as Appendix "C", a brief analysis of the testimony. In concluding our discussion of the facts, however, we think we should emphasize that, at the conclusion of the trial on the merits, Judge Hazel was evidently satisfied that the men had been hired, and that the burden was on the claimants to take the case out of the Workmen's Compensation Act. On this point, we quote from his opinion as follows:

> "Since proctors for claimants assert that they desire an opportunity to show that the New Jersey Workmen's Compensation Law, termed by them an elective act, is inapplicable, and that further testimony is necessary to establish its inapplicability, the case must take its usual course before the special commissioner, without deeming it necessary to determine the question, at this time, as to the application of the Workmen's Compensation Act, or as to whether the rights of claimants have been properly asserted by dependents or administrators" (R. 140).

The claimants did not avail themselves of the opportunity afforded them on the reference, of challenging the petitioner's evidence of employment. With one or two exceptions, they offered no evidence on the point, and petitioner did not understand that the general question of employment was really in issue until Judge Patterson's opinion was filed.

Regarded as a conclusion of law, we submit that the passage above quoted (*supra*, pp. 45-6) from the opinion of the Circuit Court of Appeals is unsound.

It is well settled under the New Jersey decisions, as well as under the decisions of other state courts interpreting similar statutes, that an injury is one "arising out of and in the course of" the employment, where it occurs while the employee is being transported by his employer to or from his place of business on a conveyance furnished by the employer primarily or exclusively for such purpose and particularly where, as here, it is an express or implied term of the contract of hiring that such free transportation during certain periods shall be furnished by the employer.

We think this rule is too well settled to require discussion, and we will merely cite some of the leading authorities, as follows:

Soden v. *Public Service Transportation Company*, 4 N. J. Misc. R. 817, affirmed by the Court of Errors and Appeals in 103 N. J. L. 713 (1927);

Fisher v. *Tidewater Building Company*, 96 N. J. L. 103; affirmed 97 N. J. L. 324;

O'Mara v. *Kirch*, 106 N. J. L. 151;

Bolos v. *Trenton Fire, Clay, etc., Co.*, 102 N. J. L. 479; aff'd. 103 N. J. L. 483;

Alberta Contracting Corporation v. *Santomassimo*, 107 N. J. L. 7;
DePue v. *Salmon Company*, 92 N. J. L. 550;
Scott v. *Payne Bros.*, 85 N. J. L. 446;
Cicalese v. *Lehigh Valley R. R. Co.*, 75 N. J. L. 897;
Matter of Littler v. *Fuller Co.*, 223 N. Y. 369;
Distefano v. *Standard Shipbuilding Corporation*, 203 App. Div. N. Y. 145;
Donovan's case, 217 Mass. 76;
Hackley-Phelps-Bonnell Co. v. *Industrial Commission*, 165 Wisc. 586;
Swanson v. *Latham & Crane*, 92 Conn. 87;
Saba v. *Pioneer Contracting* Co., 103 Conn. 559;
Harrison v. *Central Construction Co.*, 135 Md. 170;
Manchester St. Railway v. *Barrett*, 265 Fed. 557 (C. C. A., 1).

The decisions of the highest court of the State of New Jersey interpreting the Workmen's Compensation Act of that State are, of course, binding on the Federal courts.

Quong-Ham Wah Co. v. *Industrial Commission*, 255 U. S. 445;
Edward Hines' Trustees v. *Martin*, 268 U. S. 458.

Both of the lower courts recognized the correctness of the rule laid down in the *Soden* and *Fisher* cases; and that these cases were binding upon the Federal courts. They took the view, however, that the men who had not yet actually done any work were not employees within the meaning of the New Jersey cases.

The District Court apparently attached great importance to the fact that these men were coming to work for the first time. We think that this distinction is not important, nor is it supported by any authority.

The Circuit Court of Appeals appears to have proceeded on the theory that the admitted facts did not constitute a contract of hiring, under the law of New Jersey, and cited the following cases:

Coco v. *Wilbur,* 104 N. J. L. 275;
Sabella v. *Lloyd Brasileiro,* 86 N. J. L. 505, affirmed 87 N. J. L. 710;
Fineberg v. *Public Service Railway Company,* 94 N. J. L. 55.

We submit that the case of *Coco* v. *Wilbur,* which was also cited by the District Court, has no bearing on the present case. In that case the defendant employer arranged for an agent to hire cranberry pickers and to have them begin work at his cranberry bog in New Jersey on Monday morning, September 8, 1924. The agent hired a group of men, including petitioner, and directed them to proceed with him to the cranberry bog in New Jersey on Saturday evening, September 6. It was agreed between the agent and the petitioner that the petitioner was to get fifty cents per bushel for the picking. On Saturday evening, the 6th, while on the premises of the employer, the petitioner, while engaged in his own pursuits, was accidentally shot by a hunter.

As the *Coco* case did not go to the Court of Errors and Appeals, it follows first, that this case is not binding upon this Court, as it would be if it were a decision of the court of last resort of New Jersey; and second, that the case cannot be regarded as modifying in any degree

the decisions of the Court of Errors and Appeals in the *Soden* and *Fisher* cases, cited *supra*, page 49.

Apart from any question as to its authority, however, the *Coco* case is readily distinguishable from the present case. The decision of the Court of Common Pleas was based on a finding "that the locality where the accident occurred, was not a zone of danger, and the shooting was not a risk incidental to the employment". The Supreme Court stated that this conclusion was binding upon them, and that the judgment below could be safely rested upon this ground. The court then went on, however, to buttress its decision by a number of other grounds, none of which is applicable in the present case. The court concluded its opinion (104 N. J. L. 275, at p. 279), with the following remarks which, we submit, embodied the whole substance of the decision:

> "* * * that the accident did not occur at the cranberry bogs where the deceased was engaged to work; *that the accident did occur while he was engaged in his own pursuits, and that the accident was of such a nature that it could not be deemed to have been contemplated by a reasonable person as incidental to the employment had it occurred in the course of the employment.* It neither arose out of nor in the course of the employment."*

We submit that the words which we have italicized in the above quotation afford an adequate distinction between the *Coco* case and the present. Indeed, it is difficult to see how the *Coco* case could have been decided otherwise. At the time of the accident, Coco's time was his own; he was in no sense under the direction of the

* Italics ours.

employer. He was free to engage in any outdoor sport which appealed to him, or to spend his time in rest and sleep.

In order to fit the facts of the present case to those of the *Coco* case, let us assume that on Sunday morning the petitioner, knowing that the "Tercero" would dock during the afternoon, had told the men to report for work at 4 o'clock. Let us assume further that the petitioner maintained, as a part of its premises, a recreation ground for its employees; and that it told the men that any of them who chose to do so could spend the intervening hours in that spot. Assume further that the men organized two baseball teams, and that one of the players sustained injuries through being struck by a baseball. No one would suggest that there was any right to compensation in such a case; but such a case would be identical in principle with the *Coco* case.

In contrast to the *Coco* case, we ask the Court to consider another case which is precisely in point, namely, the case of *Sala* v. *American Sumatra Tobacco Company*, 93 Conn. 82, which is cited by the Circuit Court of Appeals in the present case (p. 2372). In that case the defendant, which was engaged in raising, harvesting and marketing tobacco, told the decedents:

> "that if they wanted work, to meet an automobile at the waiting-station in Thompsonville in the town of Enfield, the next morning, to be transported to the defendant's plantation in South Windsor" (p. 84).

The decedents complied with these instructions and were killed owing to an automobile accident on their way to the plantation. The Court of last resort of the

State of Connecticut, sustained a claim for compensation, saying:

> "* * * The relation that then existed between the women and the American Sumatra Tobacco Company was that of master and servant, and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the Tobacco Company" (p. 85).

The opinion concludes as follows:

> "This being so, the case is like *Swanson* v. *Latham*, 92 Conn. 87, 101 Atl. 492, in which we stated (p. 91) that 'an injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment'" (p. 85).

The entire opinion is of great interest and importance in the present case.

The *Sala* case was cited with approval and followed by the Circuit Court of Appeals for the 9th Circuit in the case of *Clemens Horst Company* v. *Hartford Accident & Indemnity Company*, 27 F. (2nd) 42. In that case the plaintiff advertised for hop pickers to begin work at its ranch on September 1st. On August 29th, one Rogan and his wife agreed to pick hops, commencing September 1st, at an agreed sum per pound, "and were to be transported by the plaintiff without charge from the railroad station at Salem to the hop yards * * *". While being so transported on August 29th (*two days before the work was to commence*), Rogan and his wife were injured in an automobile accident. The Court held that their employment had commenced at the time of

the accident. This case is also precisely in point, excepting for the fact that the suit was by the employer against his insurance company, instead of by the employee against the employer. The principle involved is exactly the same, and the decision goes far beyond the necessities of the present case. In this case also the entire opinion is most illuminating.

At first glance it would appear that the *Horst* case is squarely contrary to the *Coco* case, but we believe that a study of the two cases will disclose that there is no such inconsistency. The law is firmly established in New Jersey, as well as generally throughout the country, that the transportation of an employee to his place of employment, in a vehicle furnished for that purpose by the employer, is an incident of the employment; and any accident arising out of any such transportation falls within the compensation law. We submit that no sound distinction can be based on the question whether the employee is reporting for work for the first time, or pursuant to employment which has lasted for a long period. We know of no American case in which any such distinction has been suggested.

Moreover the *Coco* case does not stand for the suggested principle. If Coco had been transported to the plaintiff's premises in a vehicle furnished by the employer, pursuant to the contract of employment, and had been injured during such transportation, we believe that the New Jersey courts would have reached the same result which was reached in the *Horst* case, notwithstanding that in the *Coco* case (as in the *Horst* case) the work was not to begin until two days after the employee's arrival at the employer's premises. At least, we find nothing in the opinion in the *Coco* case inconsistent with this view; and we think this result would necessarily

have followed from the decisions of the New Jersey Court of Errors and Appeals. The point we desire to make is that the transportation under such circumstances is an incident of the employment; and that this rule is not affected by a subsequent temporary interruption of the employment. Obviously, in any one of the numerous "vehicle" cases, the employee, after working for a few hours, might have gone out for a walk during his lunch hour, and if injured under those circumstances, he would not be entitled to compensation. Our point is that it makes no difference whether the interruption (which is necessarily contemplated by all the parties in any such case) is to follow immediately after the employee's arrival at the employer's premises, or after a lapse of a few hours of labor. The fact is that the transportation, under the circumstances assumed, is an incident of the employment, whereas the acts of the assured in seeking amusement during his intervals of leisure are not an incident of his employment. We submit, therefore, that there is no inconsistency between the *Coco* case and the *Horst* case.

The foregoing argument, however, goes a step further than the requirements of the present case. Even if it be assumed that some peculiar legal effect attaches to an interval of leisure which is intended to follow immediately after the transportation, this principle has no application to the present case. In that respect the present case is not like the *Horst* case and the *Coco* case, but is like the *Sala* case. In this case the men were being transported directly to their place of employment, where their work would have begun immediately.

In this connection we refer to the following language

of this Court in *Cudahy Co.* v. *Parramore*, 263 U. S. 418, at page 426:

> "We attach no importance to the fact that the accident happened *a few minutes* before the time Parramore was to begin work and was, therefore, to that extent, outside the specified hours of employment. The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a *reasonable interval of time* for that purpose. See *Gane* v. *Norton Hill Colliery Co.* (1909), 2 K. B. 539, 544; *DeConstantin* v. *Public Service Commission, supra.*" (Italics ours.)

In *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, this Court, in a workmen's compensation case from Utah, said (p. 158):

> "In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached."

The *Fisher* and *Soden* cases hold that the employment begins, both as to time and place, when a man who is hired enters a vehicle furnished by his employer for the purpose of transporting him to his work.

Another case where the same principle was applied in the case of a man going to work for the first time was *Wabnec* v. *Clemons Logging Company*, 146 Wash. 469.

The case of *Sabella* v. *Lloyd Brasileiro, supra*, cited by the Circuit Court of Appeals, is clearly distinguishable from the present case. In the *Sabella* case it is clear that the plaintiff was merely going to the defendant's

plant in the hope of obtaining employment. His status was exactly the same as that of the men who were on the "Linseed King" going to the petitioner's plant for the first time, seeking work. The petitioner has conceded that these men were not employees and were not within the Workmen's Compensation Act.

The case of *Fineberg* v. *Public Service Company, supra,* cited by the Circuit Court of Appeals is also clearly distinguishable. In that case the parties had entered into a written contract which clearly contemplated that the injured man was not to be employed until after he had taken a course of instruction, which was not completed when he was injured.

(b) *The men were not engaged in a maritime employment.*

The men here under discussion had applied at the petitioner's plant for employment on Saturday and had each received one of the stubs or checks bearing an employment number. These men first came to Spencer Kellogg's plant in response to advertisements which appeared for several days in the New York World (Exhibits "L", "M", "N", Trial). The advertisement which appeared on Saturday morning (Exhibit N), read as follows:

> "LABORERS—Spencer Kellogg & Sons, Edgewater, N. J., take company boat W. 93rd St. Apply Saturday 10:30, 11:30 A. M. for day shift; 3:30, 5:15 P. M. for night shift; 48 cents per hour" (R. 2343).

These men, after passing through the Employment Office and obtaining the stub or check which bore the number corresponding to the number on their time card, were

taken in charge by Mr. McHale. He testified at the trial as to the nature of their employment as follows:

"Q. When you engaged these extra men on these occasions did you make any agreement with them as to what sort of work they were to do? A. No; just hired out as laborers.

Q. Was there any way of determining, before the men actually started to work, what particular work any particular man would do when the time came? A. No.

Q. That is to say, there would be no way to know whether he was to work on shore or on the ship? A. No, no way to tell. When we wanted men to work on the pier I just merely took them off the ship and put them on the different docks on the pier" (R. 1771-2).

"Q. Did you hire these men that have been —some of them went over there on Saturday to get jobs—did you hire them? A. No, Mr. Nelson hired them.

Q. You do not see them personally? A. I seen them Sunday morning" (R. 1774).

On cross examination by claimant's counsel, Mr. McHale testified:

"Q. Other people were paying more than that for longshore labor? A. *They were not doing longshore labor.*

Q. Were not these men working on unloading boats? A. They were working all around the plant on different propositions, *loading trucks,* loading boats, *unloading cars,* and so forth.

Q. You took on the extra men because the boat was there? A. We took on extra men because the boat was there.

Q. Then the extra men on this list would fairly represent the number of extra men required in one day? A. Some of those men would work on that boat, maybe one hour on the boat, and we would take them off and work them nine hours *in the extracting plant; we had them working all around the plant on different jobs*" (R. 1778-9).

The testimony of McHale quoted above as to the employment of these Saturday men as a class stands uncontradicted, in most cases. In some cases it is corroborated by claimant's own pleadings or testimony and in a few cases there is a conflict of evidence. We annex hereto as Appendix D a brief analysis of the testimony.

In this state of the record we think the Court should find that none of the "Saturday men" were hired for maritime work (certainly this is true as to most of them), and that accordingly there is no scope for the application of the doctrine laid down in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. If the Court finds, as a matter of fact, that the work of the "Saturday men" was to be partly maritime and partly non-maritime, then their cases are squarely controlled by the decision of this Court in *Alaska Packers Association* v. *Industrial Accident Commission*, 276 U. S. 467. There a man named Peterson was injured while endeavoring to push a stranded boat into navigable waters. Peterson was employed by a fishing and canning company as a seaman, fisherman and for general work in and about a cannery. In holding that his case fell within the State Compensation Law (and not within the *Jensen* case), the Court said (p. 469):

"Whether in any possible view the circumstances disclose a cause within the admiralty juris-

diction, we need not stop to determine. Even if an affirmative answer be assumed the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law."

In the present case, even if all of the "Saturday men" had been hired exclusively for stevedore work, we submit that they would not be within the *Jensen* case. Even as stevedores, part of their work (and probably all the work of some of them) would have been on the dock and not on the ship, and a stevedore injured on the dock is within a State compensation statute. *Industrial Commission* v. *Nordenholt*, 259 U. S. 263. An injury received while *going* to work must be within a State compensation statute, if an injury after arrival and while *engaged* in such work would be within the statute.

Furthermore, it is the *work* which the employee is doing when injured and not the nature of his general employment which is the test under the rule of the *Jensen* case. This is specifically stated in the above quotation from the *Alaska Packers* case. The "Saturday men" were doing no *work* (maritime or otherwise) at the time of the accident. There is, of course, a clear distinction between work and employment. As said in *Swanson* v. *Latham*, 92 Conn. 87, 90:

> *"The work began when the decedent reached Stafford Springs; the employment began when*

> *the decedent boarded the automobile at Willimantic,* and continued during the trip and during the work and on the return trip to Willimantic."*

Similarly this Court in *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, said:

> "In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached."

We submit that the maritime situs of an accident during transportation to work, cannot be coupled with the maritime nature of the work which *might have* been performed had the transportation been completed, so as to bring the matter within the *Jensen* case. On the facts here involved, however, the question does not arise as to the great majority of the "Saturday men". The evidence, as to most of them, is clear that they were hired as "laborers" to work principally in the plant; their work would have been, at most, only partly maritime; they were not doing maritime work when the accident occurred; and accordingly they are within workmen's compensation, under the *Alaska Packers* decision.

The undisputed facts in the present case bring the men in question within the New Jersey Workmen's Compensation Act. In this situation, the burden is on the claimants to show facts which take the case out of the Act. This was evidently Judge Hazel's view at the close of the trial (see quotation from his opinion, *supra*, p. 48); and in most of the cases no evidence was offered at the reference to show a maritime employment. We submit that the plaintiffs have not sustained the burden of bringing themselves within the principle of the *Jensen* case.

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* Italics ours.

PART TWO.

ISSUES DECIDED BY THE DISTRICT COURT ADVERSELY TO THIS PETITIONER BUT NOT PASSED UPON BY THE CIRCUIT COURT OF APPEALS.

POINT IV.

The "Linseed King" was not overloaded.

A vast amount of testimony was taken as to the number of men on board at the time of the disaster, and, also, as to the alleged overloading of the craft on previous occasions. In view of the concurrent findings of the lower courts that there were 78 men on board, we deem it unnecessary to discuss this great mass of evidence. The petitioner's contention is that there were somewhat less than 78 men on board—probably between 70 and 75, but we did not consider this small difference of sufficient importance to make it an issue in the Circuit Court of Appeals, and, of course, we shall not argue the point here.

The petitioner's position is that the "Linseed King" could safely and properly carry 78 men; and that she was not overcrowded with this number on board. Under these circumstances it becomes unnecessary to consider the voluminous and conflicting testimony with respect to the alleged overloading of the boat on previous occasions. If she was not overloaded on the occasion of the accident, it is immaterial whether she had been overloaded before.

The claimants attempted to show that the "Linseed King" had not sufficient buoyancy and stability to carry

the number of men who were on board. This contention completely failed, and was rejected by the District Court. Accordingly, we deem it unnecessary to discuss the evidence on this point, and will merely refer the Court to the testimony of the claimants' witnesses Block (R. 1462) and Lang (R. 1656), and the petitioner's witnesses Barrett (R. 609), Hale (R. 1896), Clayton (R. 1875) and Marshall (R. 422).

The only ground on which the District Court held the petitioner responsible for overcrowding, was that the crowded condition of the cabin impeded the men in their efforts to escape. The views of the District Court are summed up in the following passage from the opinion:

> "While overcrowding was not the proximate cause of the disaster, it, nevertheless, was contributory to the drowning of at least some of the men in the cabin, for no one will doubt that, if the boat had not been overcrowded, quite a number, how many of course is uncertain, would not have gone down with the foundered boat. It was a concurrent cause, and the owner, in my opinion, was not absolved from liability, even though not responsible for other causes. *Wilmington, etc.* v. *Fulton,* 205 U. S. 75; *Delaware, etc.* v. *Petrowski,* 250 Fed. 565" (R. 135).

The claimants proved that there were four men on the rear deck, outside the cabin (R. 1346-7). Accordingly, on the District Court's finding that there were 78 men on the boat, there were 74 in the cabin and pilot house (there were 4 or 5 men in the pilot house in addition to the captain, R. 1560).

It appears that the spaces available on the "Linseed King" were as follows:

Total area inside of cabin	233	sq. ft.
Area of main deck, outside the cabin	133.9	" "
Total floor area in cabin and pilot house	153.8	" "

The foregoing measurements appear in the testimony of Mr. Barrett (at R. 1825 and 1835), and were adopted by the Circuit Court of Appeals so far as they relate to areas inside the cabin and pilot house (R. 2366). Neither of the lower courts mentioned the deck area outside the cabin and pilot house, but the correctness of Mr. Barrett's testimony on this point has never been challenged.

From these figures it is apparent that with 74 men inside the cabin and pilot house, each man would have more than 2 sq. ft. of floor space and more than 3 sq. ft. of total area between the sides of the house. If, however, we take the total area on the main deck, both inside and outside the house (233 sq. ft. plus 133.9 sq. ft.) we have a total area of 366.9 sq. ft., or nearly 5 sq. ft. per man.

The foregoing computations can be checked from the detailed plans prepared by Mr. Barrett and put in evidence by the petitioner (Petitioner's Exhibits 5, 6, 7 and 8). The District Court, however, disregarded the expert testimony, making the following statement:

> "However, I disregard the expert testimony on this point and give credence to the unimpeached evidence of many survivors. They substantially testified that the men in the cabin were crowded or jammed so closely together that there was interference with their movements" (R. 136).

It may be conceded that the cabin was crowded, but crowding is a relative term. As compared with a crowded subway train, street car or elevator, the conditions in the cabin of the "Linseed King" were not uncomfortable.

Conditions such as some of the witnesses described (*i. e.*, inability of a passenger to take his handkerchief out of his pocket or to raise his arm above his head), do not arise until each person in an enclosure has very much less than 2 sq. ft. of space. Indeed, people are not densely crowded until they have less than 1½ sq. ft. of space apiece. If any scientific data is needed on this point, it will be found in Mr. Barrett's testimony, which shows that in crowded New York subways people have considerably less than 1½ sq. ft. per person; and that scientific experiments dealing with the crowds in public buildings have shown that people in such crowds sometimes have very little more than 1 sq. ft. of floor space apiece (R. 1833-4).

It is, of course, hopeless to reach any accurate conclusion from the testimony of the survivors as to the precise degree of crowding. Some of the survivors (called by the claimants) testified that the boat was not full; there was room for more men (Caracas, R. 1286; Trotter, R. 1378).

This is strongly confirmed by the testimony of claimants' witnesses that the boat had carried a very much larger number of men on previous occasions. The claimants called a number of witnesses to prove that on previous occasions the boat had carried from 90 to 100 men (*e. g.*, Lang, R. 1650; Dressler, R. 1184, 1186; Brown, R. 1481). It is worthy of note that the claimants offered an affidavit (Claimant's Exhibit NNN, R. 2349) to show that the boat had once carried 100 men in

her cabin before Rohweder took charge of her. This is precisely the number which the petitioner's witness Barrett mentioned as probably the maximum number which could be crowded into the cabin (R. 599). By actual experiment, made after the "Linseed King" was raised, it was demonstrated that 97 men could be crowded into the cabin alone (Barrett, R. 613-4).

Accordingly, both the claimants and the petitioner have offered evidence to show that the cabin and pilot house of the "Linseed King" would hold at least 100 men. In view of this agreed fact, it is obvious that the launch would not be greatly crowded with 78 men.

In the last analysis, the claimants' argument (which the District Court adopted) is that a large number of men could not get out of the cabin as quickly as a small number. This, of course, is true, but we submit that this fact does not afford any basis for holding this petitioner liable. There were three regular exits available, as well as numerous windows, which were intended to, and actually did, serve as emergency exits. It would be impossible to provide any more exits and still have a closed cabin. Indeed, we do not recall that any witness has said that the exits on the "Linseed King" were inadequate. They were far in excess of the legal requirements for boats which were subject to inspection (Barrett, R. 1826). Claimants' marine architect, Brazell, admitted that the exits would be satisfactory, although he said that he considered "the approaches to these exits inadequate" (R. 1522); by which, as he explained, he meant that there was not room enough for the people to get to the exits (R. 1533); but he failed to suggest any way in which the approaches could be improved. He criticized the rear doors for opening inward, but admitted there was no universal rule that doors must open outward (R. 1522, 1533; *cf.* Barrett, R. 1848-9).

In view of the fact that the "Linseed King" had as many exits as are ordinarily required (Barrett, R. 1826), without counting the rear door, the petitioner certainly cannot be penalized for having this door there. Moreover, it appears from the uncontradicted testimony of Mr. Aldrich and Mr. Stover that this door was of such light construction that it could easily be pushed outward, if anyone wished to do so (R. 579, 786). Under these conditions it was immaterial whether the door opened inward or outward. *Huda* v. *American Glucose Co.* (154 N. Y. 474, at pp. 479-480).

Moreover, the claimants brought out from one of their own witnesses that the rear door stayed open and men escaped through it (Boots, R. 1223).

The claimants also described the exits to their witness, Captain Charlton, United States Local Inspector of Hulls, and he had no criticism to make of them (R. 869-71).

In view of the very large number of witnesses called by the claimants, it is most significant that there is no testimony that her exits were inadequate or that any of them failed, in the emergency, to serve the purpose for which they were intended.

The claimants' charge of overcrowding is so intangible as to be difficult to discuss from a legal standpoint. Perhaps it is best stated by the witness Block, whose opinion was, in the last analysis, that passengers on a small boat should not be carried inside a cabin, but should all be carried on the open deck (R. 1466-7). He did not suggest that there was any rule of law or any established custom to support his opinion; and it was not supported by any other witness. Block is a surveyor who has had no experience with the carriage of passengers excepting in the operation of one launch across the Hudson River at Tomkins Cove. We submit that his

opinion is contrary to common knowledge and experience, and is entitled to no weight.

We deem it unnecessary to discuss in this connection the testimony of the witnesses Brazell, Rietzke and Hill, as none of them expressed any opinion as to the propriety of carrying passengers in a cabin. In so far as their testimony dealt with the carrying capacity of the "Linseed King", it had to do with her buoyancy and stability, which we have already discussed.

As opposed to the testimony of Block, the claimants themselves called two other witnesses of far greater experience and far better qualified to testify as to the carriage of passengers. The witness Crocker, Chief Engineer of the New York City ferries, testified that there was no rule regulating the number of passengers which may be carried on a ferryboat (R. 930). He testified that on the ferryboat "Mayor Gaynor", the load during rush trips, varied from 1,100 to 2,500, and said: "And if we get *many more*, we shut the gates for that boat, and the rest wait for the next one." In other words, his testimony indicates that there is no fixed rule as to the number carried. It also appeared that the "Mayor Gaynor" sometimes carries twice as many people as she has life preservers (R. 926). The witness finally gave this significant testimony:

> "Q. In computing the space that your passengers have I gather from your answers that you would consider not only the space in an enclosed cabin in which they happened to be, but any available open deck space outside the cabin, is that so? A. On the deck where passengers are carried, yes.
>
> Q. You would count that in as space available

to put on life preservers and move about? A. On the deck on which the passengers were, yes" (R. 930-1).

In connection with the foregoing testimony the Court will bear in mind that the "Linseed King" had only one deck, apart from the roof of the cabin.

Perhaps the most important testimony given by any of the claimants' witnesses, however, was the testimony of Captain Charlton, the United States Local Inspector of steam vessels.

In answer to a long question by claimants' counsel as to whether a large number of men carried in the cabin of the "Linseed King" (which was minutely described), would "have a reasonable opportunity to get their life preservers on and get out or get out and take their life preservers with them", Captain Charlton said (R. 870-1):

> "I should think they could get out of a place like that. *If for any reason they were confined in a space such as you describe,* I should think it might be somewhat difficult to get down life preservers and get them on."

Captain Charlton went on to say that he would not expect a loss of life under such circumstances, and, after some further questioning, said (R. 872):

> "Generally speaking, from my own observation and opinion, these small boats, as a rule, carry what would be considered a large number of people for them safely. We see it every day in the summer season.
>
> Q. Open boats? A. Well, yes, open boats.
>
> Q. Mostly? A. Yes, and others. I have seen them with cabins, and you can put a large number of people on board and do it safely."

Finally, after a long series of questions, he said (R. 881):

> "And usually these small boats, that is, these small boats usually can carry quite a number for their size, about as many I would say, generally as they can get on."

Mr. Charlton also expressed the view that three square feet per passenger would be sufficient to give them room to turn around (R. 878-9); and explained that in figuring this area the space above the seats should be counted in (R. 883). With 74 men in the cabin and pilot house, the "Linseed King" more than complied with this standard.

Mr. Charlton also gave the following very significant testimony (R. 881):

> "Q. How much, on excursion boats, Mr. Charlton, that you do inspect, how much cabin area do you allow per passenger? A. The cabin area is not figured as such."

The testimony last quoted shows clearly that the local inspectors do not attach any importance to the question how much of the deck is enclosed—the point on which Block apparently based his testimony.

Captain Charlton's testimony in this respect is exactly in line with the testimony of Mr. Crocker, above quoted, that the deck space outside the cabin is included in figuring the amount of space available for the passengers to put on their life preservers.

Captain Charlton also confirmed that there is no rule regulating the number of persons that can be carried on a ferryboat, and explained that the number of pas-

sengers fixed in the case of the various motor boats with respect to which his assistant gave evidence (Osborn, R. 1014-23) had reference to longer trips than those performed by a ferryboat (R. 1014).

Moreover, the claimants' witness, Rietzke, testified that in his opinion two square feet is a safe allowance for each passenger (R. 1407; on this point he agrees exactly with petitioner's witness Barrett, R. 700).

We therefore submit that the great preponderance of the claimants' own testimony is to the effect that even if petitioner had carried as many as 90 people on the "Linseed King" on the morning of the disaster, it would have violated no regulation or custom excepting by reason of its failure to carry life preservers enough for this number.

When the petitioner's testimony is considered, we submit that nothing is left of this issue. Mr. Barrett, a naval architect and marine engineer of great experience both in the designing and operation of passenger ships testified, without qualification, that in his opinion the "Linseed King" was seaworthy to carry 86 men (R. 1824-5). His opinion was confirmed by Lieutenant-Commander Hale, who testified that navy launches somewhat smaller than the "Linseed King", are rated to carry 90 men, and that they retain this rating even when they are completely enclosed with canvas leaving exits only at the front and back (R. 1896-7). Mr. Clayton, a boat builder and operator of long experience, who lengthened the "Linseed King" and laid out the work of installing the windows in the Fall of 1922, not only considered that the boat could carry 90 men (R. 1875), but so advised Mr. Stover (R. 1878-9).

We shall not discuss the testimony of Mr. Barrett and Mr. Hale in detail. These witnesses, particularly

Mr. Barrett, were cross examined at great length, so that their opinions were brought out with the utmost particularity. In the last analysis, however, the weight to be given to the opinion of an expert depends on his experience, intelligence and credibility, and we believe that the Court cannot fail to be impressed by the unusual qualifications of these witnesses in these respects. On the other hand, the witness Block, called by the claimants, while no doubt intelligent and honest, certainly did not rank with Barrett and Hale in experience or ability.

In this connection a word should be said about the assumptions on which some of the petitioner's witnesses were forced to testify on cross examination. In the case of Barrett and Stover particularly, counsel for the claimants repeatedly stated certain facts and asked the witness to perform a simple mathematical conclusion based on these facts. The answer of the witness was then treated as an admission of the facts stated. We shall not discuss this subject at length, but we call the Court's attention to a few of the places in the record where these witnesses made it clear that they did not accept the facts stated as true, but were merely stating what the result would be if they were true (R. 685-6, 703, 709-10, 780, 782, 783-4). Mr. Stover, of course, was not called as an expert on the carriage of passengers and expressly disclaimed any expert knowledge as to the number of square feet required for each passenger. He testified positively, however, that he had never seen so many men on the boat that they could not stand comfortably (R. 794).

In the light of the testimony, it is difficult to understand on just what ground the claimants base their charge of overcrowding. Even if the "Linseed King"

had been carrying passengers for hire and had been subject to regulation by the United States Local Inspectors, it is not suggested that there is any law or custom which she would have violated in carrying as many men as could stand in her cabin. Indeed this Court has specifically held that the failure of a ferryboat owner to provide seats for all the passengers that the boat will safely carry or even for the number ordinarily carried, is no evidence of negligence or want of proper care (*Burton* v. *West Jersey Ferry Co.*, 114 U. S. 474).

The claimants appear to rely on the principle of *res ipsa loquitur*. Their argument is that the men did not get out of the cabin, and therefore it was negligence to have them in the cabin. We submit that this is not a test which can be applied in a case like the present. After the event, it is easy to suggest how a disaster might have been avoided. The burden is on the claimants, however, to establish some definite, specific fault or negligence on the part of the petitioner.

Even with 90 men inside, the cabin of the "Linseed King" could be emptied very rapidly. This does not require any proof, as it merely involves the speed at which men can pass through a door—a matter of common knowledge. Certainly a line of men can pass through a door at the rate of one every two seconds, if they do not interfere with each other's movements. Accordingly, 90 men could pass through the three regular exits of the "Linseed King" in one minute, without reference to the windows, each of which was large enough to constitute an emergency exit in accordance with the requirements of the United States Local Inspectors (Barrett, R. 1826). Of course, the foregoing calculations do not apply to panic conditions; but, as a number of the witnesses pointed out, it is impossible to provide against a

panic (R. 578, 671-2). Even if the "Linseed King" had carried only 60 men, or even 40, no one can say how many of them would have escaped. Any discussion of this point is obviously mere speculation.

What actually occurred on the "Linseed King" will never be known, but it is fairly clear from the testimony that there was ample time for everyone to escape from the cabin if they had started to do so immediately after the collision. Apparently no one attempted to leave the cabin until the water had risen above the floor boards, and then all of them attempted to go through the doors at once, blocking each other's escape (R. 981, 1107, 1215-6, 1225).

We mention the foregoing facts merely as the background against which this case arises. We respectfully submit, however, that the liability of this petitioner does not turn upon the question how many people were in her cabin, or how rapidly she sank. In view of the unconfradicted evidence that the petitioner had given specific orders against running the boat in ice, the claimants naturally cast about for some ground on which the petitioner could be held responsible for failure to provide against the consequence of the violation of these orders. We submit, however, that this is merely going around in a circle. The petitioner was not bound to foresee or guard against the consequences of a practice which it had strictly forbidden.

On well settled principles of law the petitioner fulfilled its duty and complied with the requirements of law when it supplied facilities, appliances and safeguards in conformity with common and ordinary usage and custom.

In *Washington, etc., Railroad Co.* v. *McDade*, 135

U. S. 554, 569, this Court approved the following charge of the Trial Court:

> "The defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and management and care thereof, and *had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe.*"*

In *Pennsylvania R. Co.* v. *Nelson,* 259 Fed. 156, 158 (C. C. A. 2nd Circuit), an injured employee claimed that a carfloat was negligently constructed. In reversing the judgment of the District Court in favor of the plaintiff, the Court said:

> "The undisputed evidence was that the float was built as floats are customarily, and the distance between the stanchion and the side of the car was the customary distance in floats of this kind. It was not negligence, therefore, for the defendant to have in use such a float."

In *Haines* v. *Spencer,* 167 Fed. 266, 271 (C. C. A. 3rd Circuit), the Court said:

> "But the employer is not an insurer, and the duty imposed upon him is not to furnish the safest or newest and best machines and appliances, but only to exercise due care to provide those which are reasonably free from danger. 20 Am. & Eng. Encycl. Law (2d Ed.) 76; 26 Cyc. 1102; *Washington & Georgetown R. R.* v. *McDade,* 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Patton* v. *Texas & Pacific R. R.,* 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *McDonald* v. *Standard Oil Co.,* 69 N. J. Law, 445, 55 Atl. 289; *Kehler* v. *Schwenk,* 144

* Italics ours.

Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. *And the rule as to this is the usage of the business, negligence not being imputable where the machinery in question is that which is generally employed. Higgins* v. *Fanning,* 195 Pa. 599, 46 Atl. 102."*

In *Northern Pacific R. R. Co.* v. *Blake,* 63 Fed. 45 (C. C. A. 8th Circuit), the Court, in referring to the Railroad Company said:

> "It is at liberty to use such coupling appliances as are in use at the time by other well managed roads, and such as are regarded by competent railroad men as ordinarily safe and fit to be used."

To the same effect see:

> *Rogers* v. *Louisville & N. R. Co.,* 88 Fed. 462;
> *Cleary* v. *Dietz Co.,* 222 N. Y. 126, 133;
> *Hickey* v. *Taaffe,* 105 N. Y. 26.

It appears that the "Linseed King" was not only as seaworthy as the usual boat of her type in New York harbor in 1926, but was better and stronger than most of such craft. It appears that she had ample buoyancy and stability to carry at least 90 men. It appears that her cabin was properly constructed and that she had more exits than are required by any rule or custom which would have been applicable even if she had been carrying passengers for hire. It appears that there is no rule or custom against the carriage of passengers in an enclosed cabin. It appears that the law specifically exempts ferry boats from the rules regulating the number of passengers to be carried (R. 882).

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* Italics ours.

Under these circumstances we find ourselves at a loss to understand how the petitioner can be held liable on the theory that the boat was overcrowded. Even if the boat were overcrowded, this would not be the cause of the disaster. The cause of the disaster (on the claimants' own testimony) was something against which the petitioner had taken every possible precaution. It is well settled that the owner of premises cannot be held liable for failure to provide adequate means of escape from a danger for which he is not responsible.

Labatt, Master and Servant, 2nd Edit. §905, vol. 3, p. 2399,

> "it is well settled that, apart from statute, a master is not required to construct his instrumentalities, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible."

A case precisely in point is *Jones* v. *Granite Mills*, 126 Mass. 84. There a fire in a mill resulted in some twenty deaths and a large number of injuries. On the question of whether the mill owner was liable on the theory that it had failed to provide adequate means of escape, the Supreme Court of Massachusetts said:

> "It cannot be said that failure to construct proper and additional means of exit from a mill in case of fire in any way contributed to the occurrence of the fire itself. All that can be said is, that, if they had been provided, some of the results that followed from the fire might have been lessened, alleviated, or prevented. And the narrow question is presented, whether a master is required

by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible.

* * * * * * *

It is no part of the contract of employment between master and servant so to construct the building or place where the servants work, that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape. The construction and arrangement of manufactories and places where large numbers of persons are employed may be proper subjects of legislative action, and such an act has been passed since this catastrophe. St. 1877, c. 214.

We are of opinion that a verdict for the plaintiff on these facts could not be sustained;"

Another case directly in point is *Pauley* v. *Steam Gauge and Lantern Co.*, 131 N. Y. 90. The plaintiff's intestate was killed in a fire which resulted in the death of more than thirty employees, who were trapped in the building and unable to escape. Suit was brought on the ground that the defendant was negligent in not providing safe and adequate means of escape from the building in the emergency of fire, and that such negligence operated to cause the death of the intestate. In holding that there was no liability, the Court of Appeals said:

"We are satisfied that if any duty devolved upon the defendant to anticipate the possible burning of its building and provide modes of escape adequate to that emergency, such duty did not exist at common law, and had its origin and measure in the statute which for the first time required in

particular cases the construction of fire escapes. (Laws of 1887, Chap. 462, §10.) * * * The ordinary means of escape by stairs and halls and doorways and windows might reasonably be deemed sufficient, and the common law did not require, where the building was properly constructed for its intended use and purpose, that extra and unusual precautions should be adopted to protect the occupants against a danger for which the owner should be in no manner responsible, and which he was not reasonably bound to anticipate. That was held in *Jones* v. *Granite Mills* (126 Mass. 84), a case which we cited as authority in *Bajus* v. *S. B. & N. Y. R. R. Co.* (103 N. Y. 312), and the doctrine was repeated in *Keith* v. *Granite Mills* (126 Mass. 90)" (pp. 94-5).

* * * * * * * *

"It is difficult not to sympathize with the sufferers from this deplorable accident, even at the expense of one's better judgment, but we must be governed by our conviction that no cause of action was established" (p. 100).

To the same effect see:

Birmingham Ry. Light & Power Co. v. *Milbrat,* 201 Ala. 368;

Landgraf v. *Kuh,* 188 Ill. 484;

Harvey v. *The Mountain Pride Gold Mining Co.,* 18 Colo. App. 234;

Campbell v. *Spokane, etc., Co.,* 188 Fed. 516, at page 518.

Moreover, in considering the argument that the petitioner should have supplied better means of escape, what rule or standard of safety is to be applied? As stated above, we think it is clear that 90 men could have passed out of the cabin of the "Linseed King" in less

than a minute under normal circumstances. If any more exits were to be supplied, where could they be put? We submit that the claimants' argument comes back inevitably to Block's theory that men should not be carried in a cabin. There is no suggestion of any rule or custom to this effect, and it is a matter of common knowledge that most ferries carry their passengers in cabins. Claimants apparently argue that most ferries are large steel vessels, which cannot sink rapidly; but this is purely a matter of degree. Any vessel can sink rapidly in some state of facts which may possibly arise. Her boiler may blow up, or another vessel may rip open her entire side. The petitioner certainly is not rendered liable in this case merely because the "Linseed King" was a small launch and not a large steel ferry boat.

The claimants suggest, as a standard of safety that every passenger should have room to put on a life preserver in the position where he is standing at the time of an accident. This argument is obviously unsound. As indicated in Captain Charlton's testimony, and in the testimony of Mr. Barrett (R. 870, 1850), men who are on a sinking ship are not expected to and do not stand where they are, waiting for the ship to sink. If they are in a closed cabin their first and natural impulse is to go out on deck—taking a life preserver with them if they stop to think of it. As soon as a few men have gone out of the cabin (which would take only a few seconds) every one in the cabin would have ample room, even if it had been crowded previously (Barrett, R. 703). As a matter of fact, on most ferry boats there are very dense crowds in certain parts of the boat at certain hours; and no life preservers are available to the people where they are standing (Crocker, R. 925).

The short answer to the claimants' argument as to overcrowding is that it is impossible to design a cabin

which can be cleared instantaneously; nor is it possible to design a boat which will be safe for passengers in the event of her being cut in two or otherwise suddenly submerged.

In closing under this head we call attention to the fact that Judge Hazel's decision was not based on any mathematical computation or on a finding that the petitioner had violated any law or custom in this regard. His only finding was that the men were so crowded "that there was interference with their movements"; and that if there had been less people on board "quite a number, how many of course is uncertain, would not have gone down with the foundered boat". It does not appear that his decision is based on any definite rule or standard; nor would his decision furnish any guide in future to the operators of small boats.

POINT V.

The "Linseed King" was adequately manned.

The District Court found that the launch had an insufficient crew, and that this was a fault for which the petitioner was responsible.

This charge is even more intangible than the charge of overloading. It does not appear from the Court's opinion what the additional crew would have done, or how its absence contributed to the disaster. Apparently the Court considered that Rohweder should have had help to prevent the launch from being overcrowded. Hence, this charge would appear to fall with the charge of overcrowding. If the launch was not, in fact, overcrowded, the petitioner is not liable for failure to furnish an additional crew to prevent overcrowding.

It is plain, however, that the launch was adequately manned.

According to her certificate of registration (Claimants' Exhibit S, see District Court opinion, p. 138), the "Linseed King" was only required to have a crew of one man to operate her. It was a standing order in the petitioner's plant, however, that Rohweder should always have a man to help him whenever he wanted one (Stover, R. 730-1; McHale, R. 1773; Rohweder, R. 381-2, 389). There is no evidence in the record that Rohweder ever asked for help which he did not receive. It appears, however, that there were certain of the regular employees who rode on the boat every morning, and that Rohweder was accustomed to have one or more of these men stand in the pilot house with him and give him whatever assistance he required. This was entirely a matter of Rohweder's preference (Stover, R. 1937). On the morning of the accident he did not ask for any help (Rohweder, R. 382), although there were men in the plant who could have been sent with him.

Rohweder testified that on the morning of the accident he had all the help he needed; he had the help of 3 men who always helped him (R. 389).

Specifically, it appears that a chauffeur, named Roberts, who was accustomed to assist Rohweder, was standing in the pilot house with him on the morning of the disaster (R. 388, 645). Judge Hazel appeared to attach no weight to this testimony, but subsequently Judge Patterson awarded damages for the death of Roberts, on the theory that he was engaged in a maritime employment at the time of the disaster, although he was regularly employed as a chauffeur on land, and, as such, would have been subject to the New Jersey Workmen's Compensation Act (R. 196, 233). Accordingly, the decision of the District Court establishes that there was

at least one man actually assisting Rohweder; and the uncontradicted testimony of Rohweder establishes that there were two others (R. 389). The question whether these men were ordered by the petitioner to assist Rohweder, or whether they did so merely out of friendship can certainly have no bearing on the case. It is established, without contradiction, that orders had been given to supply Rohweder with any help he required; and that, on the morning of the disaster, he had all the help he needed. There being no suggestion in the case that additional men could have done anything except prevent overcrowding, the fact that the boat was not overcrowded renders this issue unimportant. So far as the question may be deemed material, however, the evidence is wholly uncontradicted that Rohweder had ample assistance.

POINT VI.

The decree of the Circuit Court of Appeals herein should be reversed and the cause remanded to the District Court with instructions to enter a decree granting the petitioner a limitation of its liability to the value of its interest in the launch "Linseed King" after the disaster; and remitting the claimants mentioned in Point III of this brief to their remedies under the New Jersey Workmen's Compensation Act.

January 1932, New York City.

Respectfully submitted,

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APPENDIX A.

The Limited Liability Act.

Texts of U. S. C. Tit. 46, §§183 and 188:

183. *Liability of owner not to exceed interest.*—The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. (R. S. §4283.)

188. *Limitation of liability of owners applied to all vessels.*—The provisions of the six preceding sections, and of sections 175 and 189, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. (R. S. §4289; Feb. 18, 1875, c. 80, §1, 18 Stat. 320; June 19, 1886, c. 421, §4, 24 Stat. 80.)

APPENDIX B.

New Jersey Workmen's Compensation Act.

Extract from New Jersey Laws of 1911, Chapter 95 as amended by Chapter 159 of the Laws of 1924:

"Section II. Elective Compensation:

"7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer."

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof, than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

"9. Every contract of hiring made subsequent to the time provided for this act to take effect

shall be presumed to have been made with reference to the provisions of section two of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section two of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section two of this act and have agreed to be bound thereby. In the employment of minors, section two shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor. * * *"

"10. The contract for the operation of the provisions of section two of this act may be terminated by either party upon sixty days' notice in writing prior to any accident."

APPENDIX C.

Analysis of pleadings and testimony as to the employment of the men who had been put on the pay-roll but who were actually going to work for the first time on the morning of the disaster.

During the trial, proctors for the claimants offered in evidence a list which contained the names of all men who had been to the petitioner's plant on Saturday and had received one of the stubs. This list (Claimants' Exhibit QQQ, R. 2351-2) also contained the clock number which was assigned to the man, and which corresponded with the number on the man's time-card and the stub.

As explained in this brief (*supra*, pp. 47-8), there is no dispute as to what actually occurred when the men in question applied for employment. Apart from the undisputed facts, there was really no room for proof, and nothing remained but to draw a conclusion from these facts. This point is well illustrated by the testimony of petitioner's witness, McHale. On direct examination he testified to the general system of employing men and said—"after they come down on the dock and are hired, they are under my supervision" (R. 1768). On cross-examination he was questioned and answered as follows (R. 1781-2):

> "Q. These men never were really hired until they started to work, that is, if you got them to go over and there wasn't any ship in at the time, or any work for them to do, you did not pay them any money? A. No, not until they started to work.

Q. So the actual contract of employment began when they started to work? A. Yes, sir.

Mr. Englar: I think that is a question of law for the Court to pass upon.

The Court: I think we ought to know whether they were employed when they came over, whether they were employed when they actually went to work or whether they were employed when they came over on the boat."

It is quite apparent that the first question quoted above merely related to the question whether the men got paid before they started to work, about which there is no dispute. The second question is a pure question of law and is highly ambiguous. The question when "the actual contract of employment began", may refer either to the making or the performance of the contract. Assuming that it relates to the former, it is still ambiguous; for there is very respectable authority for the proposition that the men "started to work" when they boarded the launch.

"The work commences when the employee enters the conveyance, and the journey is an incident to the employment."

Van Gee v. *Korts,* 252 N. Y. 241, at page 245.

We think it is apparent that such testimony is of little value, excepting as illustrating the danger of having a lay witness testify on a question of law. However, in view of the fact that the court had indicated a desire to have the witness go into the question, he was examined on re-direct and testified as follows (R. 1784):

"Q. Now, you said that the men were not employed until they got over to your side? A. That is right.

Q. Now, on this occasion, on the Saturday and Sunday preceding this accident, did you employ any men who did not work that day? A. Yes, sir.

Q. And when were they told to come back? A. They were told to come back Sunday morning.

* * * * * * *

Q. Did you tell them to come back again Monday? A. Yes, sir.

Q. What time did you tell them to come back Monday? A. 6 o'clock.

Q. From the New York side? A. Yes, sir."

The matter rested there and, accordingly, so far as McHale's testimony is of value, his final testimony was that the men were employed on Saturday.

We have already referred (*supra*, p. 46) to the testimony of Cooper. He twice testified that he was hired, and testified almost in the same breath that he was to get a preference.

As to the men who lost their lives on the "Linseed King", there is very little, if any, direct testimony as to their employment, excepting the general testimony of the petitioner. Proctors for the claimants, however, in many instances, brought out statements, made by the man after he had returned from his visit to Spencer Kellogg's employment office on the Saturday before the disaster, which indicated that the man himself considered that he had been employed on Saturday. (See R. 2137, 2161, 2133, 2135, 2232, 1417, 1137, 2315-6, 2171, 2249, 2251, 1345, 2221-2).

The pleadings in many instances throw no light on the subject of employment. However, in some of the cases relating to "Saturday men", it is specifically alleged that these men had actually been employed on Saturday, December 18th.

The following extracts are from the pleadings which refer to the status of the man:

1. *Marcos Gonzales Navas—Clock No. 3152.*

The claim in the limitation proceedings contains the following allegation:

> "4. Upon information and belief, that on the 20th day of December, 1926, the said Marcos Gonzales Navas, *being then employed by the said petitioner as a laborer in the works or factory of the petitioner* situate at said Edgewater and then residing in the Borough of Manhattan, City and State of New York, was a passenger on said launch * * * and was being transported as such passenger on said launch across said river by the petitioner, which had contracted to transport him safely and without negligence from said Borough of Manhattan to said Edgewater" (R. 91-2).

2. *Padro Mitchell—Clock No. 3106.*

The claim filed by the claimant in the limitation proceeding contains the following allegations:

> "THIRD: That prior to the 20th day of December, 1926, PADRO MITCHELL, the claimant herein and the said SPENCER KELLOGG & SONS, INC. entered into an agreement wherein and whereby for a consideration to be paid to him, *the said claimant, duly agreed to enter into the employ of Spencer Kellogg & Sons, Inc.* and the said Spencer Kellogg & Sons, Inc. *hired the said Padro Mitchell,* it being agreed by the parties hereto that such employment was to be at the Edgewater plant of the said Spencer Kellogg & Sons, Inc. or such other place

or places as may from time to time be designated by the said Spencer Kellogg & Sons, Inc." (R. 115-6).

"EIGHTH: That prior to the 20th day of December, 1926, and *subsequent to the date of hiring of the said Padro Mitchell,* by the said Spencer Kellogg & Sons, Inc., the said claimant *was directed by the said Spencer Kellogg & Sons, Inc. to be and appear and present himself at the West 96th Street pier,* in the City of New York, and was further directed to board the steamer 'Linseed King' at that place, and to proceed thereon to the plant of the said Spencer Kellogg & Sons, Inc. located at Edgewater, New Jersey" (R. 117).

The foregoing may be summarized as follows:

(a) In ten cases the witnesses state (or the pleadings allege) that the man was hired, or testify to facts which constitute a hiring, viz., Amlaw, Connolly, Navas, Kakos, Murphy, Ludwig, Proven, Sullivan, Heap and Sims.

(b) In two cases the man testified he was not hired, viz., Ice and Mitchell. Ice admitted he had been to the employment office and received one of the numbered stubs; and Mitchell in his pleadings alleged specifically that he was employed.

(c) The witness Cooper testified both ways.

(d) In the remaining seven cases no testimony was offered by the claimants, so far as we can find from the record.

APPENDIX D.

Analysis of pleadings and testimony as to whether the employment of the men who were coming to work for the first time was maritime.

We have referred in our brief (*supra,* pp. 58-60) to the general testimony offered by the petitioner that these men were engaged as laborers and that their work would have been largely, if not entirely, on shore. We have referred also to the fact that Judge Hazel placed the burden of proof on this issue upon the claimants (*supra,* p. 48).

In the following specific cases, as far as we can discover from the record, no evidence whatever on this point was produced by the claimants:

Roy Amlaw
James Bassett
Carl Bremer
Thomas Connolly
Joseph Dobransky
David Hicks
John Kakos
Bert Ramsland
Paul Saul
George Sims

In the following cases, the pleadings and/or the testimony of the witnesses produced by the claimants tend to corroborate the testimony of McHale:

1. *Marcos Gonzales Navas—Clock No. 3152.*

In paragraph "Fourth" of the claim in the limitation proceeding, it is alleged that the deceased was "employed by the said petitioner *as a laborer in the works or factory of the petitioner*" (R. 91-2).

2. *Robert Proven—Clock No. 3149.*

This survivor testified as follows:

"Re-direct examination by Miss Robinson:

Q. When you were there on Saturday did they tell you what they wanted you for? A. They didn't tell us.

Q. On Sunday what did they tell you? A. They didn't tell us anything except come back Monday.

Q. They didn't tell you what kind of work you were supposed to do? A. No" (R. 2254).

3. *James Heap—Clock No. 3129.*

James Heap accompanied the above witness, Robert Proven, to petitioner's plant, and Proven testified that the same situation existed as to Heap (Proven, R. 2250-1). Heap received one of the stubs—#3149 (R. 2255).

In a few cases, there is some testimony to indicate that the man thought he was to be employed in connection with the unloading of a ship. In most instances, however, this testimony was brought out by leading questions put to the witness by proctors for the claimants. In many cases, the man testified both ways.

1—Aaron Cooper testified as follows under examination by Mr. Axtell:

"Q. Were you employed, did you have a position, or were you working for them? A. They hired me Saturday, on the 18th.

Q. For what kind of work? A. Laborer.

Q. What? A. Laborer.

Q. Were you to work unloading a boat? A. Yes, sir.

Q. That is longshoreman's work? A. Yes, sir, longshore work" (R. 1137).

On cross examination, however, he testified as follows:

"Q. What sort of work had you done over at Spencer Kellogg? A. I work on the cakes one night and a half, I think it was in June, the month of June, I am not sure, but it was that same year. I worked for thirteen hours straight.

Q. What do you mean by working on the cakes? A. Down on the dock they have a cake pile where they stack cakes ,and they call that the cake gang, that is all I know.

Q. You were employed as a laborer, is not that so? A. Yes, sir.

The Court: Had he been in June?

Q. Had you been before? A. Yes, sir.

Q. You were employed just the same both times? A. I was signed up to come over there Saturday to unload the boat.

* * * * * * *

Q. Who hired you? A. Mr. Nelson, the timekeeper.

Q. And just what did he say to you? A. He just said, 'State your name and address', and asked us, will we be sure to come back the next day if I take your name? I said, 'Yes'. So he takes all the names and says, 'Be sure to come back Sunday'.

Q. That is all he said? A. That is all he said" (R. 1149-50).

2—William Ice testified as follows:

"Q. What character of labor was you supposed to do for Spencer Kellogg & Co.? A. I was hoping to help unload a ship.

Q. You were told that the ship had not come in and that you should report at 6:20 the next morning, is that correct? A. I was told that the ship

had not arrived and was told to be at 95th Street pier, Manhattan, about 6:20 the next morning.

Q. Had you ever done stevedoring work in New York prior to this time, or anywhere else? A. No" (R. 2322).

3—Frederick Ludwig testified as follows:

"Q. Tell us what you were doing on the boat on the morning of December 20th, 1926, how did you happen to be on the boat, tell us in a brief statement. A. I was engaged as a longshoreman to unload boats" (R. 2170).

4—Padro Mitchell testified as follows:

"What were you doing on the morning of December 20th, 1926, on the boat? A. I saw an ad in the paper and I went over to look for work and when I went over the timekeeper told me they wanted me to unload the ship and the ship wasn't in and he said to come back Sunday. I went back Sunday and he said no the ship wasn't in and to come back Monday" (R. 2182).

5—John Sullivan testified as follows:

"Q. What work were you going to do? A. Laborer.

Q. Unloading a ship? A. Unloading a seed ship.

Q. What is known as longshoreman's work? A. Longshoreman's work, yes, sir" (R. 1346).

The foregoing may be summarized as follows:

(1) According to the testimony of McHale on behalf of the petitioner, *all* the "Saturday men" were hired as general laborers whose work would be largely in the plant, and not on board the vessel.

(2) This testimony is corroborated to some extent by testimony and/or pleadings on behalf of the claimants themselves in three cases, *i. e.*, Navas, Proven and Heap, and is wholly undisputed in ten (10) of the remaining cases.

(3) Several of the remaining claimants stated that they were to unload a ship but this appears to have been merely a statement of their conclusion. The testimony of McHale is contradicted in only two cases, *i. e.*, those of Mitchell and Ludwig, and in his pleadings Mitchell describes his employment as that of "laborer". As to these two men only is there a flat conflict of testimony as to whether they were or were not hired to unload a ship, although two other claimants (Cooper and Sullivan) testified both ways.